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University of California

Class of 1905.

A TREATISE
ON THE
PRINCIPLES OF PLEADING
IN CIVIL ACTIONS

**COMPRISING A SUMMARY VIEW OF THE WHOLE
PROCEEDINGS IN A SUIT AT LAW**

BY
HENRY JOHN STEPHEN
SERJEANT AT LAW

Reprinted from the Fifth English Edition

AND EDITED BY
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EDITOR'S PREFACE.

THE first edition of *Stephen on Pleading* was published in 1824. Four other editions were brought out by the author, — the second edition in 1827, the third in 1835, the fourth in 1838, and the fifth in 1843. After the author's death two other editions were published, the sixth in 1860 and the seventh in 1866. As explained in the preface of these editions, they are in large part new books, prepared to meet the changes in pleading and procedure brought about by recent legislation, especially by the Common Law Procedure Acts of 1852 and 1854.

Between the publication of the second and third editions, in Hilary Term, 1834, the "New Rules" had been promulgated by the judges of the Superior Courts of Common Law at Westminster in conformity with the Statute of 3 and 4 William IV. cap. 42, § 1. The chief object of these rules was to restrict the scope of the general issue in the various forms of action, and they thereby made a marked change in the methods of pleading defences. No important change was made in the system of pleading between 1834 and 1852. After that time, much of the technicality as well as science of special pleading disappeared; and the old nice requirements of form are to be found neither in England nor

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America at the present time. Nevertheless, a knowledge of the principles of pleading at common law is universally admitted to be a desirable, if not a necessary, part of legal education, because of the light it throws on old precedents and also on modern simplified methods of pleading. The excellence of Serjeant Stephen's treatise has been as generally admitted, and it has been reprinted several times by American editors. These editors have, however, usually followed the English editions published prior to 1834, for the reason that the New Rules promulgated in that year have never been in force in this country. Excellent as this reason seems, believing it to be more than balanced by countervailing considerations, I have reprinted the fifth edition, the last brought out by the author, and have added such annotations as the English decisions during the decade following the publication of that edition seemed to make necessary. My aim has been to present the English system as it was immediately before the passage of the Common Law Procedure Acts, since I believe that to be the period when the system is best worth study. As this opinion may not find ready acceptance, I venture to give my reasons for it. They are as follows:—

1. The fundamental object of common-law pleading was to narrow the issue between the parties to a dispute as to the truth of a single allegation of fact. This object was achieved by treating as admitted every allegation in the course of the pleadings which was not expressly denied, and by restricting the right of denial to a single allegation. The certainty as to the exact question to be tried, and the necessity of submitting to

EDITOR'S PREFACE.

the jury a question as to one allegation only, — two undeniable advantages, — were sometimes obtained at the expense of substantial justice between the parties. Presumably for this reason, in 1705, by statute, a defendant was allowed with leave of court to plead several pleas. A widening of the scope of the general issue, so that it was treated not only as a denial of every allegation in the plaintiff's declaration, but also in many cases as setting up defences affirmative in their nature, was probably due to the same cause. The effect of the legislation and of the wide scope given to the general issue was generally to put the parties to proof of most, if not all, the material allegations in their pleadings. The New Rules were adopted for the purpose of carrying out more fully than had been done the narrowing of the issue between the parties. It seems to me worth while to bring out this particular feature of common-law pleading, and it is best brought out by cases arising under the New Rules.

2. Though the rules as to general issues and specific traverses, introduced in 1834, are not law in this country, not only is that to a considerable extent true of the practice prevailing in England before that time, but that practice was also at variance with any true principle of pleading. Baron Parke defined the operation of non-assumpsit before the New Rules as amounting "to a plea that there was no cause of action, or that if there were, it had ceased before the commencement of the suit."¹ In other words, a question of law rather than of fact was put in issue for trial by jury,

¹ *Leaf v. Tutor*, 10 M. & W. 393, 398.

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and the extent to which this was permitted, varied without reason in different forms of action.

3. Though it is now generally unnecessary for a pleader to analyse the various allegations of his opponent's pleading for the purpose of framing his own, as he may deny every allegation, the analysis required by the Hilary Rules is not without value, for such analysis is an aid in the consideration of questions of substantive law, as well as in the framing of affirmative pleadings and in the preparation and handling of evidence.

4. For twenty years the English cases came up under these rules, and frequently the same case contains points both of pleading and of substantive law so interwoven that a proper understanding of the value of the case as a precedent in substantive law is not easy without a knowledge of the rules of pleading under which the case was decided.

5. Finally, any one who masters the system here presented, will have no difficulty in understanding more relaxed or simplified methods. Indeed, I think his grasp of these will be firmer and more intelligent than it would otherwise be.

All additions made to the fifth English edition have been indicated by brackets.

SAMUEL WILLISTON.

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THE
PRINCIPLES OF PLEADING,

&c. &c. &c.

IN the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision, and to decide. It is evident that, towards the attainment of the first of these results, there is, in a *general* point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy. Thus far, therefore, the course of every system of judicature is the same. It is common to them all, to require, on behalf of each contending party, before the decision of the cause, a statement of his case. But, from this point, the coincidence naturally ceases. In the style of the contending statements, (called in forensic language, *the pleadings*,) the principles on which they are framed, the manner in which they govern or affect the subsequent course of the cause, and the degree of attention paid to their construction, each different code of law exhibits some material *difference [*2] of practice. The present disquisition relates to that peculiar system of statement established in the *common law of England*.

This system, known by the name of *Pleading*, (a) of remote antiquity in its origin, has been gradually moulded into its present form, by the wisdom of successive ages. Its great and extensive importance in legal practice, has long recommended it to the early and assiduous attention of every professional student. Nor is this its only claim to notice; for, when properly understood and appreciated, it appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly to be entitled to the character of a fine juridical invention.

It is proposed, in this work, to *collect and arrange the principal rules of Pleading, and to explain their scope and tendency as parts of an entire system.* But for the sake of greater clearness and comprehensiveness of view, it will be necessary, first, to give some idea of the general form and manner of pleading, and of its connexion with other parts of the suit. The following chapter shall, therefore, be devoted to a summary and connected account of *the whole proceedings in an action.*

(a) See Appendix, NOTE 1.

CHAPTER I.

OF THE PROCEEDINGS IN AN ACTION, FROM ITS COMMENCEMENT TO ITS TERMINATION.

ACTIONS are divided into *real*, *personal*, and *mixed*. (a) *Real* actions are those brought for specific recovery of lands, tenements, or hereditaments; *personal*, are those brought for specific recovery of goods and chattels, — or for damages, or other redress, for breach of contract, or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments, only excepted. *Mixed* actions are such as appertain, in some degree, to both the former classes, and, therefore, are properly reducible to neither of them; being brought both for specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property. But the learning which relates to this ancient division of legal remedies, has now lost much of its importance, in consequence of the recent statute, 3 & 4 Will. IV. c. 27, s. 36, by which provision is made for the abolition, within a short prospective period, of all real and mixed actions, except four.

* There are three Superior courts (b) of the [*4] common law, in each of which actions may be

(a) Bract. 101 b; Fleta, lib. i. c. 1; 3 Bl. Com. 117.

(b) This term is here used to express the courts of general, as opposed to those of local or peculiar, jurisdiction. But there is another sense of the term, which includes certain other courts besides those mentioned in the text. See *Peacock v. Bell*, 1 Saund. 73.

brought. (c) These are the Queen's Bench, the Common Pleas, and the Exchequer, — each consisting, at present, of five judges. The original distribution of business among them, upon their first establishment, was as follows: the cognisance of crime, and of such matters of litigation in general, as directly concerned the crown (those relating to the revenue excepted), was exclusively appropriate to the first of the Courts above mentioned; civil suits between subject and subject, (called *communia placita*,) to the second; and matters relating to the royal revenue, to the last. (d) In course of time, considerable violations of this arrangement took place, usurpation on the province of the Common Pleas being made by each of the other courts. Of these changes the general result is as follows. The Queen's Bench has now jurisdiction not only in those matters which belonged to it by its original constitution, but in *all personal actions whatever*. The case is the same with the Exchequer; but both these courts are still [*5] excluded * from the cognisance of actions *real* and *mixed*. (e) The Common Pleas retains its original province, and therefore entertains all actions whatever between subject and subject, whether of the real, mixed, or personal class.

Anciently it was essential to the due institution of all actions in the Superior Courts, that they should

(c) Actions may also in certain cases be *removed* into the Superior Courts, though originally brought or commenced in some inferior jurisdiction; see post, * p. 19.

(d) *Introd. to Sellon's Pract.*, sect. xxiv.; 3 Bl. Com. 44.

(e) Hale's *Disc. of the K. B. and C. P.* (in *Harg. Law Tracts*) ch. iv. Ejectment, however, if considered as a mixed action, (as has latterly been usual, see *Doe d. Kingston v. Kingston*, 1 Dowl. N. S. 263,) is an exception to this remark. And a *quare impedit* at suit of the *king* may be either in the C. P. or Q. B. 1 Arch. 435; F. N. B. 32, E.

commence by *original writ*; (*f*) in the case of real and mixed actions this is still necessary. But in personal actions the use of original writs is abolished by the recent statute 2 Will. IV. c. 39.

The *original writ* (breve originale) is a mandatory letter issuing out of the Court of Chancery, under the great seal, and, in the King's name, directed to the sheriff of the county where the injury is alleged to have been committed, (*g*) containing a summary statement of the cause of complaint, and requiring him to command the defendant (*h*) to satisfy the claim; and, on his * failure to comply, then to summon him to appear [*6] in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance.

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity, but others are of later origin, and their history is as follows. The most ancient writs had provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the

(*f*) Non potest quis sine Brevi agere. Bract. 413 b; Gilb. Hist. C. P. 2; 3 Bl. Com. 273.

(*g*) An original writ cannot be issued into a county *palatine*. For the mode of practice pursued to obviate this difficulty, see 1 Tidd's Prac. p. 100, 8th edit.

(*h*) It may be observed here, that in a *personal* action, the parties are called *plaintiff* and *defendant*; in a *real* action, more properly *demandant* and *tenant*. The former terms, however, are applicable in actions of every description, and are those commonly employed when a suit is mentioned generally, without reference to its particular nature.

clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise. (i) Therefore by the statute of Westminster * 2, 13 Ed. I. c. 24, it was provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a *like case* (in consimili casu) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament," &c. This statute it will be observed, while it gives to the officers of the Chancery the power of framing new writs *in consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognise any right to frame such instruments for cases *entirely new*. It seems, therefore, that for any case of that description, no writ could be lawfully issued, except by authority of parliament. But on the other hand, new writs were copiously produced, (k) according to the principle sanctioned by this act, *i. e.*, in consimili casu, or upon the analogy of actions previously existing: and other writs also, being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of brevia originalia.

All forms of writs once issued, were entered [* 8] * from time to time, and preserved, in the Court of Chancery, in a book called *The Register of*

(i) Vide 2 Reeves, 203; 3 Bl. Com. 50; 8 Rep. 48, 49.

(k) 3 Bl. Com. 51; 3 Woodd. 168; 4 Reeves, 430.

Writs (*l*), which in the reign of Hen. VIII. was first committed to print and published. (*m*) This book is still in authority, as containing, in general, an accurate transcript of the forms of all original writs as then framed. It seems, however, that a variation from the Register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. (*n*)

An original writ (as already stated) was formerly essential in every case, to the due institution of the suit. (*o*) These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are even now considered as within the scope of judicial remedy, in the English law, but those to which some known original writ (when these instruments were in universal use) would have applied, or for which some new original writ, framed on the analogy of those already existing, might, under the provisions of the statute of Westminster 2, have been lawfully devised. The enumeration of writs, and * that of [* 9] actions, have become, in this manner, identical. (*p*)

The *law of actions*, comprising their more particular divisions, (*q*) and the rules as to their respective competency in different cases, the proper parties to the suit, and the power of joining different claims or demands, in the same suit, is a subject which it is not necessary here to discuss, the object of this work being only to treat of those general and fundamental rules of pleading, which are applicable to all actions without

(*l*) 3 Bl. 183; 4 Reeves, 426; Gilb. Hist. C. P. 4.

(*m*) 4 Reeves, 426, 432.

(*n*) Bac. Ab. Abatement, H.; 4 Reeves, 432.

(*o*) Suprà, 5.

(*p*) See Appendix, NOTE 2.

(*q*) See a Table of Actions, Com. Dig. Action, D. 2.

distinction. In order, however, to the subsequent illustration of these rules, it will be proper to present the reader with some general account of each form of action.

The *real* and *mixed* actions which are still in force, being excepted from the general abolition of these forms of remedy by the statute 3 & 4 Will. IV. c. 27, are the four following:—WRIT OF RIGHT OF DOWER, DOWER, QUARE IMPEDIT, and EJECTMENT. (*r*)

In these actions (as already observed) the suit must still be commenced (according to the ancient practice) by original writ. (*s*)

[* 10] *The action called A WRIT OF RIGHT OF DOWER applies to the particular case where a widow claims the specific recovery of the residue of her dower, part of it having been already received by her from the tenant himself, consisting of land situate in the same town, &c., in which she claims the residue. (*t*) It is so unusual a form of action that it is not worth while to insert here the form of the writ.

The ACTION OF DOWER (OR DOWER UNDE NIHIL HABET) lies for a widow claiming the specific recovery of her dower, no part of it having been yet assigned to her. (*u*)

The form of the original writ is as follows:—

WRIT OF DOWER.

VICTORIA, &c., to the Sheriff of ——— greeting. Command *C. D.*, that justly and without delay he render to *A. B.*, widow, who was the wife of *E. B.*, now deceased, the reasonable dower which falleth to her of the freehold, which was of the said *E. B.*, her late

(*r*) See Appendix, NOTE 3.

(*s*) In ejectment there is also in occasional use another method, viz., a proceeding by *bill* instead of a supposed original. This is a relic of a system of practice abolished by a late statute, 2 Will. IV. c. 89.

(*t*) Glan. lib. vi. c. 4, 5; Booth, 166.

(*u*) Ibid.

husband, in the parish of ———, whereof she hath nothing, as she says, and whereof she complains that the said *C. D.* deforceth her. And unless he shall so do, and if the said *A. B.* shall give you security of prosecuting her claim, then summon by good summoners the said *C. D.*, that he be before our justices of the Bench at Westminster, on Tuesday, the ——— day of ——— next, to show wherefore he hath not *done it: and have you there the [*11] summoners and this writ. Witness ourself, at Westminster, the ——— day of ———, in the ——— year of our reign. (v)

The ACTION OF QUARE IMPEDIT is the remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation; and is the form of action now constantly adopted to try a disputed title to an advowson. (x)

The form of the original writ is as follows:—

WRIT OF QUARE IMPEDIT.

VICTORIA, &c., to the Sheriff of ——— greeting. Command *T.*, Bishop of ———, and *C. D.*, Esquire, and *E. F.*, clerk, that justly and without delay they permit *A. B.*, widow, to present a fit person to the church of ———, which is vacant, and belongs to her presentation, as she saith, and whereof she complaineth that the said bishop, and *C. D.*, and *E. F.* unjustly hinder her. And unless they shall so do, and if the said *A. B.* shall give you security of prosecuting her suit, then summon by good summoners the said bishop, and *C. D.* and *E. F.*, that they be before our justices at Westminster, on Tuesday, the ——— day of ——— next, to show wherefore they will not do it; and have you there the summoners and this writ. Witness ourself, at Westminster, the ——— day of ———, in the ——— year of our reign. (y)

There are some peculiarities attaching to the ACTION OF EJECTMENT which require explanation.

* As a remedy for recovery of land its history is [*12] as follows. At a very early period, that is, soon

(v) 3 Chitty, 1215, 6th edit.; Booth, 166; Glan. lib. vi. c. 15.

(x) Booth, 223; 1 Arch. 434.

(y) Booth, 225; 3 Chitty, 1207, 6th edit.; 1 Arch. 435.

after the reign of Ed. III., (z) real and mixed actions began gradually to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognisable only in the Court of Common Pleas. In lieu of them, recourse was had to certain *personal* actions, which, though they did not *claim* the specific recovery of land (like those of the real and mixed classes), were yet attended with incidents that indirectly produced that benefit. Of these, the principal, (a) and that which is alone retained in modern practice, was the action of *ejectment* — (ejectio firmæ,) — in which damages were claimed by a tenant for a term of years, complaining of forcible ejectment or ouster from the land demised. (b) In favour of this mode of remedy, the courts determined that the plaintiff was entitled, not only to recover the *damages* claimed by the action, but should also, by way of collateral and additional relief, [*13] recover **possession of the land itself* for the term of years of which he had been ousted. (c)

In consequence of the establishment of this doctrine, which gave an ejectment an effect similar to that of a mixed action, claimants of land were led to have recourse to it, in lieu of those inconvenient remedies.

(z) See Hale's Hist. of Com. Law, 176.

(a) It was, however, not the only one. The action of *forcible entry*, given by the statute 8 Hen. VI., had been applied to this purpose before the recovery of possession by ejectment came into practice. Hale's Hist. Com. Law, 176.

(b) This action is said, by Mr. Serjeant Adams, to have been invented in the reign of Ed. II., or in the early part of that of Ed. III. Adams on Ejectment, ch. i. p. 7.

(c) This is said to have been determined at some time between 1455 and 1499. See Adams on Ejectment, ch. i. p. 9. Hale says it was not till the end of the reign of Ed. IV. Hist. Com. Law, 175. See Doe d. Poole v. Errington, 1 Ad. & Ell. 756, and the note there.

Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application, by the invention of a *fictitious* system of proceeding, which enabled claimants of land, in almost every instance, upon whatever title they relied (whether term of years or freehold), to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favoured and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property. Indeed, this is so much the case, that its original character as a personal action is almost forgotten, and it has latterly been considered as belonging to the mixed class. (d)

Whenever the case is such that *the claimant [*14] has in him *the right of entry*, the fiction on which an ejectment rests is held to be allowable. And as in every case of lawful claim to land, there is now a right of entry, (e) unless the circumstances are such that an action of writ of right of dower, dower, or quare impedit is applicable, it follows that under all other circumstances an action of ejectment may be brought; and wherever it may be brought, it forms (since the late abolition of real and mixed actions in general) the *only* remedy.

As in practice the original writ is never in fact sued out in an action of ejectment, (though its existence is supposed,) it would be useless to insert here the form of that instrument. And any further explanation of

(d) See 3 & 4 Will. IV. c. 27, s. 36. *Doe d. Kingston v. Kingston*, 1 Dowl. N. S. 263.

(e) See same statute, s. 36, 39.

the nature of this action, and the fiction on which it rests, is postponed till the subject of the *declaration* comes to be considered.

Of *personal* actions, the most common are the following — DEBT, COVENANT, DETINUE, TRESPASS, TRESPASS ON THE CASE, AND REPLEVIN.

It is provided by the statute 1 & 2 Vict. c. 110, s. 2, that all personal actions in the superior courts shall be commenced by writ of *summons*. (*f*)

[*15] * The ACTION OF DEBT lies where a person claims the recovery of a *debt*, *i. e.* a liquidated or certain sum of money alleged to be due to him, (*g*) and it is generally founded on some contract alleged to have taken place between the parties, or on some matter of fact from which the law will imply a contract between them.

The form of Summons in Debt is as follows: —

VICTORIA, &c., to *C. D.* of, &c. in the county of ——— greeting. We command you [*or as before or often, we have commanded you*] that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of ———, in an action of debt at the suit of *A. B.* And take notice that in default of your so doing, the said *A. B.* may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness ———, at Westminster, the ——— day of ———. (*h*)

(*f*) By the prior act, for uniformity of process, 2 Will. IV. c. 89, the commencement might be either by summons or *capias*.

(*g*) This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called debt *in the detinet*, which lies for the specific recovery of *goods*, under a contract to deliver them. 1 Chitty, 109, 6th edit. See 1 Reeves, 159; 2 Id. 261, 329.

(*h*) There are also inserted on the writ, certain memoranda or notices, the object of which, generally, is to give further information to the defendant of the nature of the proceeding against him, and to instruct him as to the course which he ought to take. It has been thought sufficient for the purpose at present in view, to call the reader's attention only to the lan-

The ACTION OF COVENANT lies where a party claims damages for breach of *covenant*, i. e. of a *promise under seal*.

*The form of the Summons is similar to that [*16] in Debt (the name of the action only excepted).

The ACTION OF DETINUE lies where a party claims the specific recovery of goods and chattels, or deeds and writings, detained from him. This remedy is in somewhat less frequent use than any of the other personal actions above enumerated. The form of the summons is similar to that in Debt (the name of the action only excepted).

The ACTION OF TRESPASS lies where a party claims damages for a *trespass* committed against him. A trespass is an injury committed with *violence*; and this violence may be either *actual* or *implied*; and the law will imply violence, though none is actually used, where the injury is of a *direct* and *immediate* kind, and committed on the *person*, or *tangible and corporeal property*, of the plaintiff. Of *actual* violence, an assault and battery is an instance; of *implied*, a peaceable but wrongful entry upon the plaintiff's land. The form of the summons is similar to that in Debt (the name of the action only excepted).

The ACTION OF TRESPASS UPON THE CASE lies

*where a party sues for *damages* for any wrong [*17] or cause of complaint to which *covenant* or *trespass* will not apply. (i) This action originates in the power given by the statute of Westminster 2, to the

guage of the writ itself; and these collateral notices have therefore been omitted.

(i) It is not easy to give a short and sufficiently comprehensive definition of the scope of this action. That which is here attempted is perhaps new, and is believed to be accurate. A definition, somewhat similar, is given in 3 Woodd. 167.

clerks of the Chancery, to frame new writs in *consimili casu* with writs already known.^(k) Under this power they constructed many writs for different injuries, which were considered as in *consimili casu* with, that is, to bear a certain analogy to, a *trespass*. The new writs invented for the cases supposed to bear such analogy, received, accordingly, the appellation of writs of *trespass on the case* (*brevia de transgressione super casum*), as being founded on the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of *trespass*;^(l) and the injuries themselves, which are the subject of such writs, were not called *trespasses*, but had the general names of *torts*, *wrongs*, or *grievances*. The writs of trespass on the case, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them [*18] forth, began, nevertheless, to *be viewed as constituting, collectively, a new individual *form of action*; and this new genus took its place, by the name of TRESPASS ON THE CASE, among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of trespass on the case, or, perhaps, than any other form of action whatever. These are *assumpsit* and *trover*.

The action of *assumpsit* lies where a party claims *damages* for breach of *simple contract*, i. e., a *promise not under seal*. Such promises may be *express* or *im-*

(k) *Suprà*, 7.

(l) 8 Reeves, 89, 243, 391. The first example in the books of this kind of action (*viz.* trespass on the case) that has been noticed by Mr. Reeves, occurs in the reign of Edw. III. 22 Ass. 41.

pled; and the law always *implies* a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. The action of *trover* is that usually adopted (by preference to that of *DETINUE*) to try a disputed question of property in goods and chattels. In form, it claims *damages*; and is founded on a suggestion in the writ (which, in general, is a mere fiction), that the defendant *found* the goods in question, being the property of the plaintiff; and proceeds to allege that he *converted* them to his own use.

The form of the Summons in Trespass on the Case is similar to that in Debt (the name of the action only excepted).

* The ACTION OF REPLEVIN, though enter- [*19] tained in the superior courts, is not *commenced* there: (*m*) and the writ of summons provided by 1 & 2 Vict. c. 110, s. 2, for the commencement of personal suit in the superior courts, is consequently not applicable to this action. A replevin is entertained in the superior courts by virtue of an authority which they exercise of *removing* suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognisance. Where goods have been *distrained*, a party making plaint to the sheriff may have them *replevied*, that is, re-delivered to him, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress; and—if the right be determined in favour of the lat-

(*m*) The action of replevin here mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the Court of Chancery, directed to the sheriff. For the learning on this subject, consult F. N. B. 69, 70; Doct. Pl. 813, 814; 2 Inst. 139; Dalt. Sh. 273; *Moor v. Watts*, Ld. Ray. 617; 2 Selwyn, 1053.

ter—to return the goods. The action so prosecuted is called an action of REPLEVIN, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam*, or *accedas ad curiam*.⁽ⁿ⁾ In form, it is [*20] an action for *damages, for the illegal taking and detaining of the goods and chattels. It is held that a replevin may be had, and an action of replevin brought, upon other kinds of illegal taking, besides that by way of a distress^(o): but in no other case is the proceeding now known in practice.

The different forms of action, and their modes of commencement by original writ or summons,^(p) having been now, in some measure, explained, it is time to give some account of the course of proceeding upon these primary writs after they have been issued.

Supposing the original writ in a real action to be duly issued, and executed on the defendant, it is next to be *returned*.

It will be seen, on inspection of the tenor of these instruments, that the sheriff is commanded to have the writ itself in court on a certain day. On that day the writ is said to be *returnable*, and it is called the *return-day* of the writ. It always falls within the term, and must not fall in vacation. On the return-day it is the duty of the sheriff to remit the writ into the superior court of common law with his *return*; that is, a short [*21] *account, in writing, of the manner in which he has executed it.

If the defendant does not appear at the return, in

⁽ⁿ⁾ These writs vary slightly in their form. The former is in use when the replevin was commenced in the county court; the latter when commenced in the court of a lord. 2 Selwyn, 1168.

^(o) 2 Selw. 1053; 1 Chit. 162, 6th edit.

^(p) See Appendix, NOTE 4.

obedience to the original writ, there issue, when the time for appearance is past, other writs, also returnable within the term, called writs of *process*, enforcing the appearance of the defendant, either by seizure, attachment, or distress of his property, according to the nature of the case. These differ from the original writ in the following principal particulars: they issue not out of Chancery, but out of the court of common law, into which the original is returnable; and accordingly are not under the great seal, but the private seal of the court; and they bear *teste* (that is, conclude with an attesting clause) in the name of the chief justice of that court, and not in the name of the King himself. It may also be observed, that in common with all other writs, issuing from the court of common law, during the progress of the suit, they are described as *judicial* writs, by way of distinction from the *original* one obtained from the Chancery. (g)

Upon a writ of summons in a personal action, the defendant is to appear within eight days after its service. If the defendant fail to appear, the * plaintiff is in certain cases entitled to enter [* 22] an appearance for him; or he is allowed, according to the nature of the case, to enforce his appearance by further or secondary writs, under which his goods and chattels may be distrained upon, or he may be made an outlaw.

Under one or other of these writs (according to the nature of the case) the defendant is thus compelled to *appear*.

The course of practice connected with the object of compelling an appearance is a subject foreign in some measure to this work, and too varied in its nature to

(g) Bract. 413, b; 3 Bl. Com. 282; Booth, 4-23.

be capable of compendious statement.(r) Without dwelling further upon it, the *appearance* shall now be supposed to take place. At the same time the plaintiff also *appears*, and the *pleadings* commence. The next subject for consideration, therefore, shall be the manner in which the parties *appear and plead*.

Of this subject, it is impossible to obtain a clear and correct idea, without some preliminary consideration of the method of appearance and pleading *anciently* in use. It will be necessary, therefore, here to give a short account of that method.

[*23] *The appearance of the parties might be either in person or by attorney; but *actual and personal* appearance *in open court*, either by the attorney or his principal, was requisite.(s)

Upon such appearance, followed the allegations of fact mutually made on either side, by which the court received information of the nature of the controversy. These, described at first by the rude term of *loquela*, have been, in more modern times, denominated the *pleading* or *pleadings*.

As the appearance was an actual one, so the pleading was an *oral* altercation in *open court*, in *presence of the judges*.(t) This method of pleading *vivâ voce*, universally in use among the early European judicatures,(u) and indeed the natural practice of all countries where the arts of civilisation have made little progress, certainly prevailed in the English courts in the reign of Henry III.(v) and is generally supposed to have been retained there to a much later era.(x)

(r) The subject is regulated by 2 Will. IV. c. 39.

(s) See Appendix, NOTE 5.

(t) Ibid. NOTE 6.

(u) Ibid. NOTE 7.

(v) Vide Bract. 372 v.

(x) The practice is said to have been abandoned about the middle of the reign of Edw. III. Gilbert's Origin of King's Bench, v. 3. Reeves, 95.

These oral pleadings were delivered either by the party himself or his *pleader*, (called *narrator* * and *advocatus*) (*y*); and it seems that the rule [* 24] was then already established, that none but a regular *advocate*, (or, according to the more modern term, *barrister*,) could be a pleader in a cause not his own. (*z*)

It was the office of the judges to superintend, or (according to the allusion of a learned writer) (*a*) *moderate* the oral contention thus conducted before them. In doing this, their general aim was to compel the pleaders so to manage their alternate allegations, as at length to arrive at some *specific point or matter affirmed on the one side, and denied on the other*. When this matter was attained, if it proved to be a point of *law*, it fell of course to the decision of the judges themselves (to whom alone the adjudication of all legal questions belonged); (*b*) but, if a point of *fact*, the parties then, by mutual agreement, referred it to one of the various methods of trial then practised, or to such trial as the court should think proper. This result being attained, the parties were said to be AT ISSUE (*ad exitum* — that is, at the *end* of their pleading); the question so set apart for decision was itself called THE ISSUE; and was designated, according to its nature, either as an issue in *fact* or an issue in * *law*. (*c*) The whole proceeding then [* 25] closed, in case of an issue in *fact*, by an award or order of the court, directing the institution, at a given time, of the mode of trial fixed upon; or, in case of an issue in *law*, by an adjournment of the

(*y*) Bract. 412 a, 372 b.

(*z*) See Appendix, NOTE 8.

(*a*) Mr. Reeves, vol. ii. 344, where some curious specimens from the Year Books are given of the manner of the *viva voce* pleading.

(*b*) See Appendix, NOTE 9.

(*c*). See Appendix, NOTE 10.

parties to a given day, when the judges should be prepared to pronounce their decision.

During this oral altercation, a contemporaneous official minute in writing was drawn up by one of the officers of the court, on a parchment roll, containing a transcript of all the different allegations of fact, to the issue inclusive. And in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading. The official minute of the pleading and other proceedings, thus made on the parchment roll, was called **THE RECORD**. As the suit proceeded, similar entries of the remaining incidents in the cause were, from time to time, continually made upon it; and when complete, it was preserved as a *perpetual, intrinsic, and exclusively admissible* testimony of all the judicial transactions which it comprised. From the beginning

of the reign of Richard I., (d) commences [* 26] * a still extant series of records down to the present day; and such, as far back as can be traced, has always been the stable and authentic quality of these documents in contemplation of law. (e)

To return to the modern practice.

The *appearance* of the parties is no longer (as for-

(d) 1 Reeves, 218. "In the King's Bench the Rolls are preserved in the treasury" (of that Court) "from the beginning of the reign of Hen. VI.; in the C. P. from that of Hen. VIII. The earlier Rolls from the year 1195, to the end of the reign of Hen. V. in the former Court, and in the latter from 1199 to the year 1509, are deposited in the Chapter House of Westminster Abbey." 2 Tidd's Pract. 790, 8th edit. cites Jones's Index to Records, Preface, xxii.

(e) Co. Litt. 260 a. Ramsbottom v. Buckhurst, 2 M. & S. 565. See some remarks on the general subject of Records, Appendix, NOTE 11; and the Report to the House of Commons on the Public Records, ordered to be printed July, 1800, pp. 112, 119, 233, 234.

merly) by the *actual presence in court*, either of themselves or their attornies. It is effected on the part of the defendant by making a certain formal entry in the proper office of the court, expressing his appearance. (*f*) On the part of the plaintiff no formality expressive of appearance is observed; but, upon appearance of the defendant, effected in the manner above described, both parties are considered as *in court*. (*g*)

The appearance of either party may in general purport to be either in his own person, or that of * his attorney (*h*), and it may take place either [* 27] in term time or vacation. (*i*)

On appearance of the parties the *pleadings* commence. (*k*)

These have long since ceased to be delivered *orally*, or in *open court*. The present practice is to draw them up, *in the first instance, on paper*, and the attornies of the opposite parties mutually deliver (*l*) them to each other

(*f*) See 2 Will. IV. c. 39, schedule, No. 2; 1 Tidd, 238, 8th edit.

(*g*) Impey, C. P. 215.

(*h*) It is to be observed that there are certain persons, *viz.*, *infants*, *married women*, (when sued without their husbands,) and *idiots*, who are incapable of appointing an attorney to appear for them in court. The appearance and pleadings of such persons must consequently not purport to be by attorney, nor be so entered on record, whether an attorney be in fact employed or not. As for the mode in which the appearance and pleadings of such persons should be entered, see 1 Tidd, 87, 88, 94, 8th edit.; 1 Arch. Prac. 22; see also 2 Saund. 212, n. (4).

(*i*) 2 Will. IV. c. 39, s. 11.

(*k*) There can be no pleading till appearance is effected. And in a *personal* action there can till then be no *judgment* given, (see *Watson v. Dore*, 2 Mee. & W. 386. *Roberts v. Spurr*, 3 Dowl. 551.) But in a *real* action, if the tenant hold out against the process and fail to appear, judgment will pass against him, and the demandant will recover the land. See *Booth*, 12, 19, 24, &c.; *Com. Dig. Pleader* (Y.); 2 Saund. 43, n. (1).

(*l*) Where the appearance, however, has been entered by the plaintiff for the defendant, the declaration is *filed* in an office of the court, not *delivered*. The subsequent pleadings are always *delivered*, *H. T.* 4 Will. IV. B. 1, as is the declaration also, except in the case above specified.

out of court; a proceeding which (like the appearance) may take place not only in term time, [* 28] but in vacation, when the * court is not sitting. (m) These paper pleadings, at a subsequent period, are entered *on record* (according to a course of practice that will be afterwards stated) by transcribing them on a parchment roll.

At what exact period, and by what gradations, these alterations of the ancient system took place, has not been accurately determined. The most probable opinion seems to be, that the mode of departure from the old practice of making verbal statements in open court, and entering them contemporaneously on record, was that the pleader (through an allowed relaxation of that proceeding) began to discontinue the oral delivery, and, in lieu of it, entered his statement, in the first instance, upon the parchment roll, on which the record used to be drawn up — that the pleader of the other party had access to this roll, in order to concert his answer, which he afterwards entered in the same manner, and that the roll thus formed both the primary statement and the record — that this method being attended with some inconveniences, the expedient was at length adopted of putting the pleadings, first, *on paper*, delivering them in that form to either party, or filing them in the proper office of the court, and deferring [* 29] the entry of them * on record till a subsequent stage of the cause (n) It is supposed that the mode of entering, in the first instance, on the roll, continued at least as late as the reign of Ed. IV. (o) When

(m) Ibid. But no declaration or pleading is to be filed or delivered between 10 August and 24 October. 2 Will. IV. c. 39, s. 11.

(n) 3 Reeves, 427.

(o) 3 Reeves, 427.

it began, that is, when the oral pleading was first abandoned, is a point of some uncertainty; but the probability seems to be, that it took place in the middle of the reign of Ed. III. (*p*)

It is, however, particularly to be observed, that the abandonment of the practice of oral pleading led to no departure from the ancient style of allegation. The pleading has ever since continued to be framed upon the same principles, and to pursue the same forms, as when it was merely oral. The parties are made to come to *issue* exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the judges of former times prescribed to the actual disputants before them, are, as far as possible, still enforced with respect to these paper pleadings. (*q*)

As the oral pleading could formerly be delivered by none but regular advocates, so, at the present day, it is necessary that each paper pleading should be *signed* by a *barrister*, some of the more ordinary * and simple kind and all declarations excepted. [* 30] On this head, it may be further observed that the pleadings, though thus signed, and sometimes in fact *drawn* by barristers, are also often *drawn* by the attornies, or by persons of learning, who have not been admitted to the degree of barrister, but are employed by the attornies in that department of practice exclusively, — and are known by the name of *special pleaders*.

After these preliminary explanations as to the general practical form of the modern pleadings, it is time to consider their individual construction.

The pleading begins with the *declaration* or *count*,

(*p*) 3 Reeves, 95.

(*q*) See Appendix, NOTE 12.

which is a statement, on the part of the plaintiff, of his cause of action. (*r*) In a *real* action, it is most properly called the *count*; in a *personal* one, the *declaration*. (*s*) The latter, however, is now the general term; being that commonly used when referring to real and personal actions without distinction. In the declaration, the plaintiff states the nature and quality of his case, — and in proceeding by original it is a rule that the statement of it must be in strict conformity with the tenor of that instrument; any substantial variance between them being a ground of objection. It will be [* 31] *convenient here to exhibit examples of the declaration, in the form which it wears in those actions, of which some account has already been given.

COUNT IN DOWER. (*t*)

In the Common Pleas.

—— Term, in the —— year of the reign of Queen Victoria (*u*)
 —— to wit, *A. B.*, widow, who was the wife of *E. B.*, deceased, by —— her attorney, demands against *C. D.* the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, two thousand acres of meadow, two thousand acres of pasture, and two thousand acres of other land, with the appurtenances, in the parish of ——, in the county of ——, as the dower of the said

(*r*) See Appendix, NOTE 13.

(*s*) Reg. Plac. 2, cites *F. N. B.* 16 a., 60 d.

(*t*) See the Original Writ, *suprà*, * p. 10.

(*u*) By Reg. Hil. T. 4 Will. IV. R. 1, every pleading is to be entitled of the *day of the month and year*; but these rules have been decided not to extend to real actions; *Miller v. Miller*, 3 Dowl. 408; and therefore the declaration in these actions is entitled of the term and year of the monarch's reign, as in the former practice. The same doctrine is also held with respect to declarations in ejectment. See *Tidd's New Pract.* 625. *Doe d. Evans v. Roe*, 2 Ad. & El. 11. But it is not irregular to entitle a declaration in ejectment of the day of the month and year. *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253; 1 Scott, 166, S. C. *Doe d. Wills v. Roe*, Will. W. & D. 76.

A. B. of the endowment of *E. B.*, deceased, heretofore her husband, whereof she hath nothing, &c. (x)

DECLARATION IN QUARE IMPEDIT. (y)

In the Common Pleas.

—— Term, in the —— year of the reign of
Queen Victoria.

—— to wit, *T.*, bishop of ——, *C. D.*, Esquire, and *E. F.*, * Clerk, were summoned to answer *A. B.*, widow, of a [* 32] plea (z), that they permit the said *A. B.* to present a fit person to the rectory of the parish church of ——, in the county of ——, which is vacant, and belongs to her presentation. And thereupon the said *A. B.*, by ——, her attorney, complains that whereas one Sir *J. D.*, Bart. now deceased, in his life time, to wit, on the —— day of ——, in the year of our Lord ——, was seised of the manor of *K.*, with its appurtenances, to which manor the advowson of the said rectory, with its appurtenances, then belonged in his demesne as of fee. And being so seised thereof as aforesaid, he, the said Sir *J. D.*, afterwards, to wit, on the —— day of ——, in the year ——, presented to the said church, being then vacant, one *E. G.*, his clerk, who, on the presentation of the said Sir *J. D.*, was admitted, instituted and inducted into the same, in the time of peace, in the time of our Sovereign, Lord George the Third, late King of Great Britain. And he, the said Sir *J. D.*, being so seised of the said manor, and the said advowson belonging thereto as aforesaid, afterwards, to wit, on the —— day of ——, in the year ——, died so seised of such estate therein, upon whose death the said manor, with the said advowson so belonging thereto, descended to the said *A. B.*, as daughter and heiress of the said Sir *J. D.*, whereby she became and was seised of the said manor, with the said advowson so belonging thereto, in her demesne as of fee. And being so seised, the said church afterward, to wit, on the —— day of ——, became vacant by the death of the said *E. G.*, whereby it then and there belonged, and now belongs, to the said *A. B.*, to present a fit person to the said

(x) 3 Chitty, 1218, 6th edit.; Booth, 166; Rast. Ent. 234 b.

(y) See the Original Writ, *suprà*, * p. 11.

(z) "Plea," in this and many other instances, is still used in its ancient sense of *suit* or *action*, vide Appendix, NOTE 1. This, however, (as will be seen hereafter), is not now its usual or ordinary meaning.

church so being vacant as aforesaid. But the said bishop, [* 33] *C. D.*, and *E. F.*, will not permit her, but unjustly * hinder her; wherefore she, the said *A. B.*, saith that she is injured, and hath sustained damage to the value of ——— pounds. And therefore she brings her suit, &c. (*a*)

In ejectment (as already observed (*b*)) the whole method of proceeding is anomalous, and depends on fictions invented and upheld by the courts for the convenience of justice, in order to escape from the inconveniences which were found to attend the ancient forms of real and mixed actions. An ejectment commences by delivering to the tenant in possession of the premises, a declaration framed as against a fictitious defendant (for example, Richard Roe), at the suit of a fictitious plaintiff (for example, John Doe). This declaration is framed as if it had been preceded by original writ (*c*) against Richard Roe; but is, in fact, the first step in the cause. Subscribed to this declaration, is a notice, in the form of a letter (*d*), from the fictitious defendant to the tenant in possession, apprising the latter of the nature and object of the proceeding, and advising him to appear in court in the next term, to defend his possession. Accordingly, in the next term, the [* 34] tenant in possession * obtains a rule of court, allowing him to be made defendant, instead of Richard Roe, upon certain terms prescribed by the court for the convenient trial of the title — among others, his appearing and receiving, without writ or process, a new

(*a*) 3 Chitty, 1209, 6th edit.; 1 Arch. Pl. 1st edit. 438; 10 Went. 87.

(*b*) Vide *supra*, * p. 13.

(*c*) There is also in the case of ejectment a mode of proceeding by *bill*, as it is called, instead of a supposed original writ. This is a relic of a system of process abolished by the late statute, and of too rare occurrence to require more particular notice.

(*d*) See the form of it, 2 Chitty, 627, 6th edit.

declaration like the first, but with his own name inserted as defendant, — and pleading thereto. The form of such new declaration is as follows: —

DECLARATION IN EJECTMENT.

In the Queen's Bench.

—— Term, in the —— year of the reign of
Queen Victoria.

—— to wit, *C. D.* was attached to answer John Doe of a plea of trespass and ejectment, and thereupon the said John Doe, by ——, his attorney, complains: For that whereas *A. B. (e)* heretofore, to wit, on the —— day of —— in the year of our Lord ——, had demised to the said John Doe —— messuages, —— stables, —— yards, and —— gardens, situate and being in the parish of ——, in the county of ——, to have and to hold the same to the said John Doe and his assigns, from the —— day of —— in the year aforesaid, for and during and unto the full end and term of —— years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him therein granted as aforesaid. And the said John Doe being so * thereof possessed, the said *C. D.* [*35] afterwards, to wit, on the —— day of —— in the year aforesaid, with force and arms entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not expired, and ejected him the said John Doe out of his said farm, and other wrongs to the said John Doe then and there did, against the peace of our said Lady the Queen, and to the damage of the said John Doe of —— pounds; and therefore he brings his suit, &c.

(e) This is the name of the party who really institutes the suit, called "the lessor of the plaintiff," and so distinguished from the nominal plaintiff John Doe.

DECLARATION IN DEBT.

On a Bond.

In the Queen's Bench.

The — day of —, in the year of our
Lord — (f).

— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff. For that whereas the defendant heretofore, to wit, on the — day of —, in the year of our Lord —, by his certain writing obligatory, sealed with his seal, and now shown to the court here, (the date whereof is the day and year aforesaid,) acknowledged himself to be held and firmly bound to the plaintiff in the sum of — pounds above demanded, to be paid to the said plaintiff; Yet the defendant hath not as yet paid the said sum of — pounds or any part thereof, to the plaintiff, but so to do hath hitherto wholly refused, and still refuses, to the damage of the plaintiff of — pounds; and therefore he brings his suit, &c.

[*36]

* DECLARATION IN DEBT

On Simple Contract.

In the Queen's Bench.

The — day of —, in the year of our
Lord —.

— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff. For that whereas the defendant heretofore, to wit, on the — day of —, in the year of our Lord —, was indebted to the plaintiff in the sum of — pounds, for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, to be paid by the defendant to the plaintiff on request; Yet the defendant hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the plaintiff, but

(f) The declaration in personal actions is to be entitled according to this method; Reg. Hil. T. 4 Will. IV. r. 1; Reg. M. T. 3 Will. IV.

so to do hath hitherto wholly refused, and still refuses, to the damage of the plaintiff of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN COVENANT.

On an Indenture of Lease — for not Repairing.

In the Queen's Bench.

● The ——— day of ——— in the year of our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit), by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, *by a certain in- [*37] denture then made between the plaintiff of the one part, and the defendant of the other part, (one part of which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid), the plaintiff, for the consideration therein mentioned, did demise, lease, set, and to farm let unto the defendant a certain messuage or tenement, and other premises, in the said indenture particularly specified, to hold the same, with the appurtenances, to the defendant, his executors, administrators and assigns, from the twenty-fifth day of March next ensuing the date of the said indenture, for and during and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at a certain rent payable by the defendant to the plaintiff, as in the said indenture is mentioned. And the defendant, for himself, his executors, administrators and assigns, did thereby covenant, promise and agree, to and with the plaintiff, his heirs and assigns, (amongst other things,) that he the defendant, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition: and the same messuage or tenement and premises, and every part thereof, should and would leave in such good repair, order and condition, at the end or other sooner determination of the said term, as by the said indenture, reference being thereunto had, will, among other things, fully appear. By virtue of which

said indenture, the defendant afterwards, to wit, on the twenty-fifth day of March, in the year aforesaid, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the plaintiff hath always, from the time of the making of the said indenture, hitherto done, performed and fulfilled all things [*38] in the said *indenture contained on his part to be performed and fulfilled, yet the plaintiff saith, that the defendant did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition, and leave the same in such repair, order and condition, at the end of the said term; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment. And the defendant left the same, being so ruinous, in decay, and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the plaintiff saith, that the defendant (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same; and to keep the same with the plaintiff hath hitherto wholly refused, and still refuses, to the damage of the plaintiff of ——— pounds, and therefore he brings his suit, &c.

DECLARATION IN DETINUE.

In the Queen's Bench.

The ——— day of ——— in the year of our
Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or, in his own proper person,*] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas the plaintiff heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, delivered to the defendant certain goods and chattels, to wit, forty bushels of wheat, of the plaintiff, of great value, to wit, the value of [*39] ——— pounds, of lawful *money of Great Britain, to be redelivered by the defendant to the plaintiff when he the defendant should be thereto afterwards requested: Yet the de-

defendant, although he was afterwards, to wit, on the —— day of ——, in the year aforesaid, requested by the plaintiff so to do. hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the plaintiff, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the plaintiff, to the damage of the plaintiff of —— pounds; and therefore he brings his suit, &c. (a)

DECLARATION IN TRESPASS.

For an Assault and Battery.

In the Queen's Bench.

The —— day of —— in the year of
our Lord ——.

—— to wit, *A. B.*, (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff: For that the defendant heretofore, to wit, on the —— day of ——, in the year of our Lord ——, with force and arms, made an assault upon the plaintiff, and beat, wounded and ill-treated him, so that his life was despaired of; and other wrongs to the plaintiff then did; against the peace of our said Lady the Queen, and to the damage of the plaintiff of —— pounds; and therefore he brings his suit, &c.

* DECLARATION IN TRESPASS.

[* 40]

Quare Clausum Fregit.

In the Queen's Bench.

The —— day of —— in the year of
our Lord ——.

—— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff: For that the defendant heretofore, to wit, on the —— day of ——, in the year of our Lord ——, with force and arms broke and entered the close of the plaintiff, that is to say, a certain close called ——, situate and being in the parish of ——, in the county of ——, and with his feet, in walking, trod

(a) 2 Chitty, 399, 6th edit.

down, trampled upon, consumed and spoiled the grass and herbage of the plaintiff then and there growing, and being of great value, to wit, of the value of ——— pounds, of lawful money of Great Britain; and other wrongs to the plaintiff then and there did; against the peace of our said Lady the Queen, and to the damage of the plaintiff of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE.

In Assumpsit.

special assumpsit

On a Bill of Exchange by Indorsee against Acceptor, with a second count on an account stated.

In the Queen's Bench.

The ——— day of ———, in the year of our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or, in his own proper person,*] complains of [*41] *C. D.* * (the defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas one *G. H.* on the ——— day of ———, in the year of our Lord ———, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay *I. K.* or order the sum of ——— pounds, ——— days after the date thereof, (which period is now elapsed (*a*),) and the defendant then accepted the said bill, and the said *I. K.* then indorsed the said bill to the plaintiff, of all which the defendant then had notice; and then in consideration of the premises promised the plaintiff to pay to him the amount of the said bill according to the tenor and effect thereof, and of his said acceptance. And whereas also the defendant afterwards, to wit, on the day and year aforesaid, was indebted to the plaintiff in ——— pounds, on an account then stated between them: And the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises promised the plaintiff to pay him the said last-mentioned money on request. Yet he hath disregarded his promises, and hath not paid any of the said monies or any part thereof to the plaintiff's damage of ——— pounds; and thereupon he brings his suit, &c.

(a) See *Owen v. Waters*, 2 Mees. & Wels. 91.

DECLARATION IN TRESPASS ON THE CASE.

*In Assumpsit.**special* —

On a Promissory Note by second Indorsee against maker, with a second count on an account stated.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———,

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.*, * (the defendant in this suit,) who has been summoned to answer the said plaintiff. For that whereas the defendant on the ——— day of ———, in the year of our Lord ———, made his promissory note in writing; and thereby promised to pay to one *G. H.* or order ——— pounds, two months after the date thereof, (which period is now elapsed,) and then delivered the said note to the said *G. H.*, and the said *G. H.* then indorsed the said note to one *I. K.*, who then indorsed the same to the plaintiff, whereof the defendant then had notice; and then in consideration of the premises promised the plaintiff to pay to him the amount of the said note according to the tenor and effect thereof: And whereas also, the defendant afterwards, to wit, on the day and year aforesaid, was indebted to the plaintiff in the sum of ——— pounds on an account then stated between them; and the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises promised the plaintiff to pay to him the said last-mentioned sum of money on request: Yet the defendant hath disregarded his promises, and hath not paid any of the said monies or any part thereof, to the plaintiff's damage of ——— pounds; and thereupon he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE. *general assumpsit**In Assumpsit.*

For Goods sold and delivered, and work and labour done, with the common money counts.

In the Queen's Bench.

The ——— day of ———, in the year of our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.*, (the [*43] defendant in this suit,) who has been summoned to *answer the plaintiff. For that whereas the defendant, on the ——— day of ———, in the year of our Lord ———, was indebted to the plaintiff in ——— pounds, for the price and value of goods then sold and delivered by the plaintiff to the defendant, at his request: And in ——— pounds for the price and value of work then done and materials for the same provided by the plaintiff for the defendant at his request: And in ——— pounds for money then lent by the plaintiff to the defendant at his request: And in ——— pounds for money then paid by the plaintiff to the use of the defendant at his request: And in ——— pounds for money then received by the defendant for the use of the plaintiff: And in ——— pounds for money found to be due from the defendant to the plaintiff, upon an account then stated between them: And thereupon the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money respectively on request: Yet the defendant hath disregarded his promise, and hath not paid any of the said monies or any part thereof, to the plaintiff's damage of ——— pounds; and thereupon he brings suit, &c. (b)

(b) The several demands for goods sold, &c. are here consolidated (as is frequently the case) into the same declaration, forming different *counts* thereof. Being of very frequent occurrence in practice, their form has been fixed by a rule of Court, Trin. 1 Will. IV.

DECLARATION IN TRESPASS ON THE CASE.

In Trover.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of **C. D.* [*44] (the defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas the plaintiff heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs of great value, to wit, of the value of ——— pounds, of lawful money of Great Britain; and being so possessed thereof, he the plaintiff afterwards, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the defendant by finding: Yet the defendant, well knowing the said goods and chattels to be the property of the plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the plaintiff (although often requested so to do); but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the ——— day of ———, in the year ———, converted and disposed of the said goods and chattels to his the defendant's own use, to the damage of the plaintiff of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE.

For a Libel.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, [*or*, in his own proper person,] complains of *C. D.* (the

defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas the plaintiff now is a good, true [*45] and honest subject of this realm, and until the *committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty of perjury or any other such crime. And whereas, before the committing of the said grievance, a certain action had been depending in the Court of our Lady the now Queen, before the Queen herself at Westminster, in the county of Middlesex, wherein one *E. F.* was the plaintiff, and one *G. H.* was the defendant; which said action had been then lately tried at the assizes in and for the county of ———; and on such trial the plaintiff had been examined on oath, and had given his evidence as a witness on the part of the said *E. F.*; Yet the defendant, well knowing the premises, but greatly envying the happy condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that the plaintiff had been guilty of perjury, heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, falsely, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the plaintiff, and of and concerning the said action, and the evidence so given by the plaintiff, a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, defamatory and libellous matter following, of and concerning the plaintiff, and of and concerning the said action, and the evidence so given by the plaintiff, that is to say, he (meaning the plaintiff) was foresworn on the trial (meaning the said trial, and thereby then and there meaning, that the plaintiff, in giving his evidence as aforesaid, had committed wilful and corrupt perjury). By means of the committing of which grievance, the plaintiff hath been, and is greatly injured in his said good fame and credit, and brought into public scandal, infamy [*46] and disgrace, insomuch that divers good and worthy *subjects of this realm have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe the plaintiff to have been guilty of perjury; and have, by reason of the committing of the said grievance, from henceforth hitherto, wholly refused to have any transaction or acquaintance

with the plaintiff as they otherwise would have had, to the damage of the plaintiff of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE.

For the Disturbance of a Watercourse.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

——— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney [or, in his own proper person,] complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff: For that whereas before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was possessed of a certain water-grist mill, with the appurtenances, situate at ———, and by reason thereof, before and at the time of the committing of the said grievances of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream or watercourse, in the county of ———, which, during all those times ought to have run and flowed, and until the committing of the grievances hereinafter mentioned, of right have run and flowed, and still of right ought to run and flow unto the said mill of the plaintiff, for the supplying the same with water for the working thereof. Yet the defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the plaintiff in this behalf, and to deprive him of *the use, benefit [*47] and advantage of the water of the said stream or watercourse, and to hinder and prevent him from working his said mill in so ample and beneficial a manner as he had heretofore done, and of right ought to have done, whilst the plaintiff was so possessed of the said mill, with the appurtenances as aforesaid, to wit, on the ——— day of ———, in the year of our Lord ———, and on divers other days and times between that day and the commencement of this suit, in and out of the sides of the said watercourse or stream, and higher up the watercourse or stream than the said mill, wrongfully and injuriously diverted and turned, and caused to be diverted and turned, divers large quantities of the water of the said stream or watercourse out of the usual and proper course thereof, and away from the said

mill, and kept and continued the said diversions, and caused the same to be so kept and continued for a long space of time, to wit, from thenceforth hitherto, and thereby prevented a large part of the water of the said stream or watercourse from running or flowing in or along its usual and proper course to the said mill, and from supplying the same with water, as the same of right should and otherwise would have done; and by reason thereof sufficient water for the supplying of the said mill during all or any part of that time, could not, nor did run or flow to the same, as of right it ought to have done, and otherwise would have done: and the plaintiff could not, during all that time, use his said mill in so large and ample a manner as he might and otherwise would have done, but was deprived of the use and enjoyment thereof, and of all the benefits and advantages, which he might and otherwise would have made and derived from the same. To the plaintiff's damage of £——; and thereupon he brings his suit, &c.

[*48] * DECLARATION IN REPLEVIN.

In the Queen's Bench.

The —— day of ——, in the year of our
Lord ——.

—— to wit, *C. D.* (the defendant in this suit,) was summoned to answer *A. B.* (the plaintiff in this suit,) of a plea, wherefore he took the cattle of the plaintiff, and unjustly detained the same, against sureties and pledges, until, &c.; and thereupon the plaintiff, by —— his attorney, [*or*, in his own proper person,] complains: For that the defendant heretofore, to wit, on the —— day of ——, in the year of our Lord ——, at ——, in the county of ——, in a certain place there called ——, took the cattle, to wit, one mare, of the plaintiff, of great value, to wit, of the value of —— pounds, and unjustly detained the same, against sureties and pledges, until, &c. Wherefore the plaintiff saith that he is injured, and hath sustained damage to the value of —— pounds; and therefore he brings his suit, &c. (t)

The plaintiff having *declared*, (i. e. delivered his declaration,) it is for the defendant to concert the manner of his defence. For this purpose, he considers whether,

(t) 8 Went. 24. See an ancient precedent, 10 Ed. III. 24.

on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of *law*, to the redress he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this by defect either in the *substance* or the *form* of the declaration, i. e.

* as disclosing a case insufficient on the merits, [*49] or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. In so doing, he is said to *demur*; and this kind of objection is called a *demurrer*. (u)

A demurrer (from the Latin *demorari*, or French *demorrer*, to “wait, or stay,”) imports, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer. The form of a demurrer to a declaration will appear by the following examples:—

DEMURRER. (w)

To the Declaration.

For matter of Substance.

In the Queen’s Bench.

The —— day of ——, in the year of
our Lord ——.

C. D.) The defendant, by —— his attorney, [*or*, in
ats { person,] says that the declaration is not sufficient in
A. B.) law.

(u) See Appendix, NOTE 14.

(w) The form of a demurrer is fixed by Rule of Court, H. T. 4 Will. IV. founded on the Second Report of Common Law Commissioners, p. 84.

[* 50]

* DEMURRER.

To the Declaration.

For matter of Form.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, by ——— his attorney, [*or*, in per-
ats } son,] says, that the declaration is not sufficient in law.
A. B. } And the defendant, according to the form of the statute
in such case made and provided, shows to the Court here the
following causes of demurrer to the declaration: that is to say,
that no day or time is alleged in the declaration, at which the
said causes of action, or any of them, are supposed to have accrued.
And also that the declaration is in other respects uncertain, in-
formal, and insufficient, &c.

If the defendant does not demur, his only alternative method of defence is, to oppose or answer the declaration by matter of *fact*. In so doing, he is said to *plead* (x), (by way of distinction from *demurring*), and the answer of fact, so made, is called the *plea*.

Pleas are divided into pleas DILATORY and PEREMPTORY; and this is the most general division to which they are subject. (y)

[*51] *Subordinate to this is another division.

Pleas are either *to the jurisdiction of the Court* — *in suspension of the action* — *in abatement of the writ or declaration* — or, *in bar of the action*; the three first of which belong to the DILATORY class(z), the last is of the PEREMPTORY kind.

(x) This, it will be observed, is a narrower sense of the term to *plead* than it otherwise bears; for in its more general meaning, as elsewhere stated (vide Appendix, NOTE 1), it imports making *any allegation in the cause*; and so taken, would include the case of a *demurrer* or a *declaration*.

(y) See Appendix, NOTE 15.

(z) See Appendix, NOTE 16. All dilatory pleas must be verified by

A *plea to the jurisdiction* is one by which the defendant excepts to the jurisdiction of the Court to entertain the action. The following is an example :

PLEA TO THE JURISDICTION.

In an Action of Ejectment for Lands situate within a County Palatine. (a)

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, in his *proper person* (b) says, that the
ats } said county of Durham is, and, from time whereof the
A. B. } memory of man is not to the contrary, hath been
a county palatine; and there now are, and for all * the time [*52]
aforesaid have been, justices there; and that all and singular
pleas for the recovery of manors, messuages, and tenements, lying
and being within the said county, have been for all the time afore-
said, and still are, pleaded and pleadable within the said county of
Durham, before the justices there for the time being, and not here
in the Court of our Lady the Queen, before the Queen herself. And
this he is ready to verify. Wherefore, since the plea aforesaid is
brought for recovery of the possession of the manors, messuages,
lands, and hereditaments aforesaid, within the said county palatine,
the said defendant prays judgment if the Court of our Lady the
Queen here will or ought to have further cognizance of the plea
aforesaid.

A *plea in suspension* (c) of the action is one which shows some ground for not proceeding in the suit at

affidavit or otherwise; 4 Anne, c. 16, s. 11. *Lovell v. Walker*, 9 Mees. & Wels. 299; and must be pleaded within four days from the delivery of the declaration. See *Ryland v. Wormald*, 2 Mees. & W. 393.

(a) See *Chapman v. Madison*, 2 Str. 1089. *Wilbraham v. Lownds*, 12 Mod. 535. *Lampley v. Thomas*, 1 Wils. 193. *Perry v. Jones*, Doug. 213; Com. Dig. Abatement, (D. 2); 1 Went. 49. N. B. In ejectment this plea cannot be pleaded, except by leave of the Court.

(b) It must be pleaded in person, Bac. Ab. Pleas and Pleadings, (E.), s. 2. Gilb. C. B. 187. *Grant v. Soudes*, 2 W. Bl. 1094.

(c) Gilb. C. P. 186.

the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas is small, and none of them is of ordinary occurrence in practice. (*d*)

A *plea in abatement* is one which shows some ground for *abating* or *quashing* the original writ in [*53] * a real or mixed action, or the declaration in a personal action, and makes prayer to that effect. (*e*)

The grounds for such plea are any matters of fact tending to impeach the correctness of the writ or declaration; i. e. to show that they are improperly framed, without, at the same time, tending to deny the right of action itself.

Besides these pleas in abatement, properly so called, there are others which take exception to the personal competency of the parties to sue or to be sued; these are not founded on any objection to the writ or declaration, and therefore do not fall within the definition which has been given of pleas in abatement; but as they offer like them a sort of formal objection, and do not tend to deny the right of action itself, they are considered as of the same general nature with that class of pleas, and pass under the same denomination.

The following are examples of pleas in abatement:

(*d*) One of these pleas in suspension was the *infancy* of the defendant or plaintiff. This plea, mentioned in the books under the head of *parol demurrer*, has been lately abolished by the statute 11 Geo. IV. & 1 Will. IV. c. 47, s. 10.

Another plea in suspension of the suit, was that of *aid prayer*; as to which see Com. Dig. Aide (B. 5), (B. 6); Booth, 60. *Lightfoot v. Lenet*, Cro. Jac. 421. *Onslow v. Smith*, 2 Bos. & Pul. 384.

Excommunication of the plaintiff is another plea in suspension. See 1 Chitty, 448, 6th edit.; Reg. Plac. 179, 180.

(*e*) See Appendix, NOTE 17.

*PLEA IN ABATEMENT.

[*54]

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, by ——— his attorney, [*or*, in per-
ats } son,] prays judgment of the said declaration, because
A. B. } he says that the said several supposed promises and under-
takings in the said declaration mentioned (if any such were made),
were made jointly with one *G. H.*, who is still living, and at the
commencement of this suit was and still is resident within the
jurisdiction of this Court, to wit, at ———, and not by the de-
fendant alone. And this the defendant is ready to verify.
Wherefore inasmuch as the said *G. H.* is not named in the said
declaration, together with the said defendant, he, the said defend-
ant, prays judgment of the said declaration, and that the same may
be quashed. (*ee*)

PLEA IN ABATEMENT.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, by ——— his attorney, [*or*, in per-
ats } son,] says, that the plaintiff ought not to be answered
A. B. } to his declaration aforesaid, because, he says, that the
plaintiff is an alien born, to wit, at Calais, in the Kingdom of
France, in parts beyond the seas under the allegiance of the
king of France, an enemy of our Lady the now Queen, born
of father and mother adhering to the said enemy; and that the
plaintiff entered this kingdom without the safe conduct of our
said Lady the Queen. And this the defendant is ready to
verify. Wherefore he prays judgment, *if the plaintiff [*55]
ought to be answered to his declaration aforesaid (*f*), &c.

[*ee*] A plea in this form would be held bad on demurrer for not pray-
ing judgment of the plaintiff's writ as well as of the declaration. *Davies*
v. Thomson, 14 M. & W. 161. *Whitling v. Des Anges*, 3 C. B. 910.]

(*f*) *Rast. Ent.* 252 c.; *Lil. Ent.* 1; *Mod. Ent.* 9; 1 *Went.* 42, 29.
N. B. A plea in abatement being a dilatory plea, must be verified by *affi-*
davit, or otherwise, when delivered, vide *Sup.* * p. 51, n. (*z*).

The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on resorting to a better form of writ or declaration, may maintain a new action, if the objection were founded on the frame or tenor of those instruments; or if the objection were to the ability of the party, (as in the last of the above examples,) a new action may be brought when that disability is removed.

Such is, in its principle, the doctrine of pleas in abatement; but the actual power of using these pleas has been much abridged, and the whole law relating to them consequently rendered of less prominent importance than formerly, by the effect of modern alterations. Of these the principal are as follows: 1. A large proportion of these pleas was in former times founded on objections applying to the frame of the original writ exclusively of the declaration. By the recent statute 2 Will. IV. c. 39, (abolishing the original writ in personal actions,) this species of the plea is in personal actions of course absolutely extinguished; and [*56] in *actions of every kind it had long been practically abrogated by certain Rules of Court in the reigns of Geo. II. and Geo. III., providing that *oyer* should no longer be granted of the original writ, that is, that the defendant should no longer be permitted to demand to *hear it read in Court* for the purpose of founding an objection to its tenor. 2. One of the most frequent pleas in abatement has hitherto been that of *misnomer*, viz., that the plaintiff or defendant was misnamed in the writ or declaration. This plea of misnomer is abolished in personal actions by the late act 3 and 4 Will. IV., c. 42, s. 11, and a new mode of

taking the objection substituted. (g) 3. Another plea in abatement of the most ordinary occurrence was that of *nonjoinder* of a necessary party, of which an example is above given. This plea having been often adopted where the omitted party was abroad, or his residence unknown to the plaintiff, and its operation being in such cases of a very unfair kind, it is now provided by the same statute (sect. 8,) that it shall henceforth be disallowed unless it contain an allegation that the defendant resides within the jurisdiction of the Court, and be accompanied with an affidavit stating the place of residence. The effect of that provision will probably be to render *the use of the plea of [*57] *nonjoinder* considerably less frequent. (h)

A *plea in bar of the action* may be defined as one which shows some ground for barring or defeating the action. (i) A plea in bar is, therefore, distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ or declaration. It is, in short, a substantial and conclusive answer to the action. (k) It follows from this property, that in general it must either deny all, or some essential part of, the averments of fact in the declaration — or, admitting them to be true, allege new facts which obviate

(g) The objection cannot be taken advantage of after the time for pleading is past. *Moody v. Aslatt*, 5 Tyr. 492; 1 C., M. & R. 771; 3 Dowl. 486 S. C. See as to misnomer, *Finch v. Cocken*, 5 Tyr. 774.

(h) See Appendix, NOTE 18. *Wheatley v. Golney*, 9 Dowl. 1019.

(i) Ibid. NOTE 19. The time for pleading a plea in bar is four days, if the venue be laid in London or Middlesex, and the defendant reside within 20 miles of London; otherwise eight days.

(k) The different grounds or subjects of pleas in bar, in each different form of action, will be found enumerated, Com. Dig. Pleader, (2 A.) — (3 O. 19.)

or repel their legal effect. In the first case, the defendant is said, in the language of pleading, to *traverse* (l) the matter of the declaration; in the latter, to *confess and avoid* it. Pleas in bar are consequently divided into pleas *by way of traverse*, and pleas *by way of confession and avoidance*.

[*58] * Of pleas in bar, of each of these descriptions, the following are examples :

PLEA IN BAR.

By way of Traverse.

In Covenant, on Indenture of Lease — for not repairing. (m)

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, by ———, his attorney, [or, in per-
ats } son,] says that the windows of the said messuage or
A. B. } tenement were not in any part thereof ruinous, in decay,
or out of repair, in manner and form as the plaintiff hath above
complained against him, the defendant. And of this he puts
himself upon the country.

PLEA IN BAR.

By way of Confession and Avoidance.

In a like action.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant, by ——— his attorney, [or, in per-
ats } son,] says that, after the said breach of covenant, and
A. B. } before the commencement of this suit, to wit, on the
——— day of ———, in the year of our Lord ———, the

(l) See Appendix, NOTE 20.

(m) See the Declaration, *suprà*, * p. 37.

plaintiff, by his certain deed of release, sealed with his seal, and now shown to the court here (the date *whereof is [*59] the day and year last aforesaid,) did remise, release, and for ever quit claim to the defendant, his heirs, executors, and administrators, all damages, cause and causes of action, breaches of covenant, debts and demands whatsoever, which had then accrued to the plaintiff, or which the plaintiff then had against the defendant; as by the said deed of release, reference being thereto had, will fully appear. And this the defendant is ready to verify.

The nature of a demurrer to the declaration, and of plea, and the different kinds of plea, being now explained, we will continue our examination of the process of pleading, and will first suppose that the defendant takes the course of pleading to the declaration in bar, by way of *traverse*. In this case, it is evident that a question is at once raised between the parties; and it is a question of *fact*,—viz., whether the facts in the declaration, which the traverse denies, be true. A question being thus raised, or, in other words, the parties having arrived at a specific point or matter affirmed on the one side, and denied on the other, the defendant (as the party traversing) is, conformably to the ancient practice (*n*), obliged to offer to refer this question to some *mode of trial*; and does this, by annexing to the traverse an appropriate formula, proposing either a trial by the *country*, (i. e. by a jury,)—as in the example, *p. 58, or such other method of decision as by law belongs *to the particular [*60] point. If this be accepted by his adversary, the parties are then (conformably to the language of the ancient pleading (*o*)) said to be AT ISSUE; and the question itself is called the ISSUE. Consequently a party

(*n*) Vide *suprà*, *p. 25.

(*o*) Ibid.

who thus traverses annexing such formula, is said to *tender issue*; and the issue so tendered, is called an issue *in fact*. Thus, in the example at * p. 58, the defendant, by his plea, tenders an issue in fact, on the want of repair.

If it be next supposed, that, instead of traversing, the defendant chooses to *demur*, it is obvious that a question is in this case also raised between the parties; and it is a question of *law*, viz. whether the declaration be sufficient, in point of law, to maintain the action. The defendant, by his demurrer, not only raises this question of law, but is understood thereby to refer it to the proper mode of decision for all points of law, viz., *the judgment of the Court*; and as upon a traverse, he tenders an issue in fact, so he is said, in this case, to tender an issue *in law*. Thus, in the example, * p. 50, the defendant, by his demurrer, tenders an issue in law, on the sufficiency of the declaration.

The issue, whether in fact or law, being thus [*61] *tendered*, it is necessary, before the issue is *complete, that it be *accepted*. And this subject shall be considered, first, as it respects the issue in *law*.

The tender of the issue in *law*, where the defendant demurs to the declaration, is *necessarily* accepted by the plaintiff; for he has no ground of objecting either to the *question itself*, or the proposed *mode of decision*. A question on the legal sufficiency of the declaration, he cannot, of course, without abandoning his own form of proceeding, decline; and with respect to the mode of decision, viz., the judgment of the Court, there is, in matters of law, no alternative method. He is therefore obliged to *accept*, or *join* in the issue in law; and does so, by a set form of words called *joinder in demurrer*; of which the following is an example:—

JOINDER IN DEMURRER.

*Upon the Demurrer, *p. 50.*

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

<p>A. B. } v. } C. D. }</p>	<p>The plaintiff says that the declaration is sufficient in law.</p>
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But the tender of the *issue in fact*, where the
*defendant traverses the declaration, is *not* [*62]
necessarily accepted by the plaintiff; for, first,
he may consider the *traverse itself* as insufficient in law.
It will be recollected that by the traverse, the defendant
may deny either the *whole*, or a *part*, of the declaration;
and, in the latter case, the traverse may, in the opinion
of the plaintiff, be so framed as to involve a *part immaterial*
or *insufficient to decide the action*. Again, he may
consider the traverse as *defective in point of form*, and
object to its sufficiency in law, on that ground. So, in
his opinion, the *mode of trial proposed*, may, in point of
law, be inapplicable to the particular kind of issue.
On such grounds, therefore, he has an option to *demur*
to the traverse, as insufficient in law. The effect of
this demurrer, however, would only be to postpone the
acceptance of issue, by a single stage; for, by the de-
murrer, he tenders an issue in law; and his adversary,
according to the principle already laid down, (*p*) would
be obliged to join in demurrer, that is, to accept the
issue in law, in the next pleading. On the other
hand, supposing a demurrer not to be adopted, the
alternative course will be, to accept the tendered issue

(*p*) *Supra*, *p. 60.

of fact, and also the mode of trial which the traverse proposes; and this is done (in case of trial by jury) by a set form of words, called a *joinder in issue* or a *similiter* in the following form:—

[*63]

*JOINDER IN ISSUE,

OR

SIMILITER.

*Upon the Traverse, in *p. 59.*

In the Queen's Bench.

The —— day of ——, in the year of
our Lord ——.

A. B. } The plaintiff, as to the plea of the defendant above
v. } pleaded, and whereof he hath put himself upon the coun-
C. D. } try, doth the like.

The issue in law or fact being thus tendered, and accepted on the other side, the parties are *at issue*; and the pleading is at an end.

Hitherto it has been supposed that the defendant either *pleads in bar*, *by way of traverse*, or *demurs* to the declaration; but we will now suppose him to plead either one of the kinds of *dilatory plea*, or a *plea in bar*, *by way of confession and avoidance*. In either case the plaintiff has the option of *demurring* to the plea—as being, in substance or form, an insufficient answer, in point of *law*, to the declaration,—or of *pleading*, to it, by way of *traverse*, or by way of *confession and avoidance* of its allegations. Such *pleading*, (*q*) on the part of the plaintiff, is called *the replication*.

[*64] *If the replication be by way of *traverse*, it is necessary (as in the case of the plea) that it

(*q*) See Appendix, NOTE 21.

should *tender issue*. So, if the plaintiff *demur*, an issue in law is necessarily tendered; and, in either case, the ultimate result is a *joinder in issue*; upon the same principles as above explained with respect to the plea. But if the replication be in *confession and avoidance*, the defendant may then, in his turn, either *demur*, — or, by a *pleading, traverse, or confess and avoid*, its allegations. If such pleading take place, it is called *the rejoinder*.

In the same manner, and subject to the same law of proceeding, viz. that of *demurring, or traversing, or pleading in confession and avoidance*, is conducted all the subsequent altercation, to which the nature of the case may lead; and the order and denominations of the alternate *allegations of fact* (or *pleadings*) throughout the whole series, are as follows: — *declaration, plea, replication, rejoinder, surrejoinder, rebutter and surrebutter*. After the surrebutter, the pleadings have no distinctive names; for beyond that stage they are very seldom found to extend. (r)

To whatever length of series the pleadings may happen to lead, it is obvious, that by adherence to the plan here described, one of the parties *must, [*65] at some period of the process, more or less remote, be brought either to *demur* or to *traverse*; for, as no case can involve an inexhaustible store of new relevant matter, there must be somewhere a limit to pleading in the way of *confession and avoidance*. Examples have already been given of the demurrer and traverse occurring at the *second* stage of the pleading, viz. in the plea: in those which here follow, they are not produced till after a longer series.

Let the plaintiff be supposed to declare in *Assumpsit*, and the defendant to plead in *abatement*; (for example,

(r) See Appendix, NOTE 22.

the non-joinder of a joint contractor, as in * p. 54). The plaintiff may then be supposed to *reply* thus:—

REPLICATION.

By way of Traverse.

Upon the Plea, * p. 54.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

A. B. } The plaintiff says, that his said declaration, by reason
v. } of any thing in the said plea alleged, ought not to be
C. D. } quashed, because he says that the said promises and
undertakings were made by the defendant alone, in manner and
form as the plaintiff hath above complained; and not by the de-
fendant jointly with the said G. H., in manner and form
[*66] as the defendant hath * above, in his said plea, alleged.
And this the plaintiff prays may be inquired of by the
country.

Again, let the plaintiff be supposed to declare in
Covenant on an indenture of lease (as in * p. 37,) and
the defendant to plead in bar, by way of confession and
avoidance; (for example, a release, as in * p. 60;) the
plaintiff may then be supposed to reply thus:—

REPLICATION.

By way of Confession and Avoidance.

Upon the Plea, * p. 58.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

A. B. } The plaintiff says, that he the plaintiff, at the time of
v. } the making of the said supposed deed of release, was
C. D. } unlawfully imprisoned and detained in prison by the de-

fendant, until, by force and duress of that imprisonment, he the plaintiff made the said supposed deed of release, as in the said plea mentioned. And this the plaintiff is ready to verify. (s)

To this the defendant may be supposed to *rejoin*, as follows:—

* REJOINDER.

[*67]

By way of Traverse.

Upon the above Replication.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant says, that the plaintiff freely and vol-
ats } untarily made the said deed of release, and not by force
A. B. } and duress of imprisonment, in manner and form as by
the said replication alleged. And of this the defendant puts him-
self upon the country. (t)

In these examples, the parties ultimately arrive at a *traverse*; but it may happen, that in any part of the series, a *demurrer*, instead of a *traverse*, may take place. Thus, if the defendant, in the last example, chose to dispute the sufficiency, in point of law, of the substance of the matter in the replication, he would, instead of a rejoinder, *demur* to the replication, thus:—

DEMURRER.

To the last Replication in * p. 66.

In the Queen's Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant says that the replication is not sufficient
ats } in law.
A. B. }

(s) See a similar Replication, 2 Richardson's K. B. 60; 8 Edw. III., pl. 20.

(t) See a similar Rejoinder, 2 Richardson's K. B. 60.

[*68] * As the parties will at length arrive at demurrer or traverse, so, whenever a *traverse* is at length produced, it comprises a *tender of issue* (as in the above examples); and a *demurrer* also necessarily involves a tender of issue; the consequence of which is, in either case, a *joinder in issue*, exactly upon the same principle as above explained with respect to the plea; so that the parties arrive *at issue*, after a longer series of pleading, precisely in the same manner as when the process terminates at the earliest possible stage. Such is, in a general view, the nature of the process of pleading, and the manner of coming to issue. (u)

And here we may take occasion to notice an important corollary or inference, resulting from the preceding explanations, as to the nature of demurring and of pleading, viz. that a demurrer is never founded on matter collateral to the pleading which it opposes, but arises on the face of the statement itself: — a pleading is always founded on matter collateral. This consideration will serve as a guide to determine whether a given objection should be brought forward by way of pleading or of demurrer. Thus, if the declaration in Assumpsit omit to mention upon what consideration the promise was made, it is an objection to which that statement, on the face of it, is subject, and

[*69] * which should consequently be taken by way of demurrer; but if one of the parties making the promise is omitted, the fact that there was such a party, is one of a collateral nature, not disclosed by the declaration itself, and must be brought forward therefore by way of plea, viz. a plea in abatement.

The pleading has been hitherto supposed to take its direct and simple course. There are, however, some

(u) See Appendix, NOTE 23.

pleas out of the common form, and of occasional occurrence only, by which its progress is sometimes broken or varied; and of these it will now be proper to give some account.

The *pleas* here referred to are those which have been known by the name of *pleas puis darrein continuance*.

By an ancient practice, very recently abandoned, when adjournments of the proceedings took place for certain purposes, from one day or one term to another, there was always an entry made on the record, expressing the ground of the adjournment, and appointing the parties to re-appear at the given day, which entries were called *continuances*. In the intervals between such continuances and the day appointed, the parties were of course *out of Court*, and consequently not in a situation to plead. But it sometimes happened, *that after a *plea* had been pleaded, and while [*70] the parties were out of Court, in consequence of such a continuance, a new matter of defence arose, which did not exist, and which the defendant had consequently no opportunity to plead, *before* the last continuance. This new defence, he was therefore entitled, at the day given for his re-appearance, to plead as a matter that had happened *after* the last continuance — (*puis darrein continuance* — *post ultimam continuationem*.)

By a late rule of Court, Hil. T. 4 W. IV., it is provided that no entry of continuances (with a single exception there mentioned) shall in future be made; (*x*) but there is a proviso that in all cases in which a *plea puis darrein continuance* was then by law pleadable, “the same defence may still be pleaded, with an alle-

(*x*) See *Nurse v. Greeting*, 5 Tyrw. 179; 1 C., M. & R. 567; 3 Dowl. 157, S. C. *Wigley v. Tomlins*, 3 Dowl. 7.

gation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.” (y) The plea will henceforth therefore be pleaded in the following form, and under the following denomination:—

[*71] *PLEA TO THE FARTHER MAINTENANCE OF THE ACTION.

In the Queen’s Bench.

The ——— day of ———, in the year of
our Lord ———.

C. D. } The defendant by his attorney [*or*, in person] says,
ats } that the plaintiff ought not *farther* to have or maintain
A. B. } his aforesaid action against him; because, he says, that
after the last pleading in this cause, that is to say, on the ———
day of ———, in the year of our Lord ———, the plaintiff, by
his certain deed of release, sealed with his seal [the release may
be here stated, as *suprà*, *p. 58.] And this the defendant is
ready to verify. Wherefore he prays judgment, if the plaintiff
ought *farther* to have or maintain his aforesaid action against
him, &c.

It is to be observed that the effect of such a plea is not to impugn the right of action altogether, but only the right of *farther* maintaining it; i. e. since the period when the matter of defence arose; and in this respect it differs from an ordinary plea in bar, which is in the nature of an absolute and general exception to the plaintiff’s right to maintain the action, and tends to deny that it was properly brought.

A plea of this kind is always pleaded by way of substitution for the former plea; on which no proceeding is afterwards had. It may be either in bar or [*72] abatement; (z) and is followed, like *other pleas,

(y) See Second Report Common Law Commissioners, p. 32, for an explanation of the views which led to this alteration.

(z) Com. Dig. Abatement, I. 24.

by a replication and other pleadings, till issue is attained upon it. (a)

There are also *incidents* of occasional occurrence, by which the progress of the pleading is sometimes varied. In modern practice however there is only one of them of sufficient importance to require notice in this place. This is the *demand of oyer*.

Where either party alleges any deed, he is in general obliged, by a rule of pleading that will be afterwards considered in its proper place, to make *profert* of such deed; that is, to produce it in court simultaneously with the pleading in which it is alleged. This, in the days of oral pleading, was of course an actual production in court. Since then, it consists of a formal allegation that he shows the deed in court; it being, in fact, retained in his own custody. An example of this allegation will be found in the declaration of debt on a bond, as above given. (b)

* Where *profert* is thus made by one of the [*73] parties, the other, before he pleads in answer, is entitled to *demand oyer*, that is, *to hear it read*. For it is to be observed, that the forms of pleading do not, in general, require that the whole of any instrument which there is occasion to allege, should be set forth. So much only is stated as is material to the purpose; of which the example last cited will also serve for illustration.

(a) See an example in *Littleton v. Cross*, 3 Barn. & Cress. 317. By a late rule, H. T. 4 Will. IV., no plea of this kind is to be allowed, unless accompanied by an affidavit that the matter of it arose within eight days next before the pleading thereof, or unless the court or a judge shall otherwise order. See *Powell v. Duncan*, 5 Dowl. 550. *Todd v. Emly*, 9 M. & W. 606; 1 Dowl. N. S. 598, S. C. For an instance of dispensation with this affidavit, see *Hibblewhite v. Reynolds*, 7 Scott, 232. After a plea *puis darrein continuance*, the plaintiff may always discontinue without payment of costs. *Waller v. Smith*, 9 A. & E. 505.

(b) *Supra*, * p. 36.

The other party, however, may reasonably desire to hear the whole; and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents, not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege of hearing the deed read verbatim.

When the profert was actually made in *open court*, the demand of oyer, and the oyer given upon it, took place in the same manner; and the course was, that on demand by one of the pleaders, the deed was read aloud by the pleader on the other side. (*b*) By the present practice, the attorney for the party by whom it [*74] is demanded, * before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer; on which the latter is bound to carry to him the *deed*, (*c*) and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court. (*d*)

(*b*) Semb. Com. Dig. Pleader, (P. 1.) *Simpson v. Garside*, Lutw. 1644. In *Jevons v. Harridge*, 1 Sid. 38, the reading of the deed is said to be the *act of the Court*; but the true doctrine is probably that laid down in *Lutwyche*. The rule seems to have been that *writs* were read by the Court, but *deeds* by the pleader. See Com. Dig. Pleader, (P. 1.)

(*c*) The deed itself must be produced, *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789.

(*d*) *Page v. Divine*, 2 T. R. 40; 1 Tidd, 635, 8th edit.; 1 Sel. 264; *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789. *Daly v. Mahon*, 4 Bing. N. C. 235. *Smith v. Goldsworthy*, 1 Dowl. N. S. 288. The party demanding is entitled to a copy of the attestation and names of the witnesses, 1 Saund. 9 b. n. (*e*) There is no settled time for the plaintiff to give oyer. The defendant must give it in two days exclusive after the demand. 1 Tidd, 637, 638, 8th edit. It may be demanded after obtaining time to plead on the usual terms. *Goodricke v. Turley*, 1 Tyr. & Gr. 149; 2 C., M. & R. 694; 4 Dowl. 431, S. C.

Oyer is demandable in all actions, real, personal, and mixed.

Oyer is said to have been formerly demandable not only of *deeds*, but of *records* (e) alleged in pleading; but, by the present practice, it is not now granted of a record; (f) and can be had only * in [*75] the cases of *deeds*, *probates*, and *letters of administration*, &c., of which profert is made on the other side: of *private writings not under seal*, oyer has never been demandable. (g)

Oyer can be demanded only where profert is made. (h) In all cases where profert is necessary, and where it is also in fact made, the opposite party has a right, if he pleases, to demand oyer; but, if it be unnecessarily made, this does not entitle to oyer; and so, if profert be omitted when it ought to have been made, the adversary cannot have oyer, but must demur. (i)

(e) Com. Dig. Pleader, (P. 2.) *Ward v. Griffith*, *Ld. Ray.* 83. See, however, the remark on this subject in 1 *Arch. Pl.* 168, 2d ed., and see *The King v. Amery*, 1 *T. R.* 149.

(f) See *The King v. Amery*, 1 *T. R.* 150. But if a judgment be pleaded, the party pleading it must give the date and number of the roll on which it is entered and filed, or his plea will not be received, 1 *Tidd*, 636, 8th edit.; *R. Hil. T.*, 4 *W. IV.* As to the application of *this rule, see *Power v. Izod*, 1 *Bing. N. C.* 304; 1 *Scott*, 119, *S. C.* [*75] *Brokenshin v. Morgan*, 1 *Dowl. N. S.* 378; 9 *M. & W.* 111, *S. C.*

(g) But where an action is founded on a written instrument not under seal, though the defendant cannot pray oyer, yet the Court will, in some cases, make an order for delivery of a copy of it to the defendant or his attorney, and that all proceedings in the mean time be stayed, 1 *Tidd*, 639, 8th edit.; 1 *Saund.* 9 d. n. (g) It seems that oyer is not demandable of an act of Parliament, 1 *Tidd*, 637; nor of letters patent, 1 *Arch.* 169; nor of a recognizance, *Ibid.* But it is demandable of a deed enrolled, or of the exemplification of the enrolment, according to the terms of the profert, *Ibid.*

(h) Therefore in an action on a bond conditioned for performance of the covenants in another deed, the defendant cannot crave oyer of such deed, but must himself plead it with a profert. 1 *Chitty*, 431, 6th edit.

(i) *Arch.* 168; 1 *Saund.* 9 a. n. (d)

PLEA IN BAR.

In the Queen's Bench.

(2) By a late rule, however, Hil. T., 2 Will. IV., if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer. See Com. Dig. Pleader, (P. 1.) *Smith v. Jennings*, 9 Dowl. 162.

(n) See the Declaration, *supra*, * p. 86.

bond, which shall be supposed to be for payment of one hundred pounds on a certain day, is set forth verbatim) : which, being read and heard, the defendant says that he, the defendant, on the said ——— day of ———, in the year aforesaid, in the said writing obligatory mentioned, paid to the plaintiff the said sum of one hundred pounds in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition. And this the defendant is ready to verify. (o)

When oyer is demanded and the deed set forth, as above explained, the effect is as if it had been set forth in the first instance by the opposite party; and the tenor of the deed as it appears upon oyer is consequently considered as forming a part of the last precedent pleading. (p) Therefore if the deed, when so set forth by the plea, be found to contain in itself matter of objection or answer to the plaintiff's case, as stated in the declaration, the defendant's course is to *demur*; — as for matter apparent on the face of the declaration; (q) — and it would be improper to make the objection the subject of *plea*.

Questions arising upon the right to oyer are now generally settled upon application to the * court or a judge. But this is not the only [*78] course; for if a party demands oyer, in a case where, upon the face of the pleading, his adversary conceives it to be not demandable, the latter may *demur*; (r) or if he has any matter of fact to allege as a ground why the oyer cannot be demanded, he may *plead* such matter. (s) If he pleads, the allegation is called a *counter-plea to the oyer*; all pleadings of this

(o) 3 Chitty, 858, 6th edit.

(p) See *Paine v. Emery*, 5 Tyrw. 1097; 2 C., M. & R. 304, S. C. See *Smith v. Jennings*, 9 Dowl. 155. *Ashton v. Freeston*, 2 Man. & Gr. 1.

(q) *Jeffrey v. White*, Doug. 475. *Snell v. Snell*, 4 Barn. & Cress. 741.

(r) 1 Saund. 9 b. n. 1.

(s) *Ibid*.

incidental kind, diverging from the main series of the allegations, being termed *counter-pleas*. (t) Again, on the counter-plea, in all these cases, there may happen to be a replication, and other subsequent pleadings; and so the parties may come to *issue* in law or in fact on this collateral subject, in the same manner as upon any principal matter in controversy.

Supposing the cause to be *at issue*, the next proceeding is to make a transcript upon paper of the whole pleadings that have been delivered between the parties. This transcript, when the issue joined is an issue in law, is called the *demurrer-book*; when an issue in fact, it is called *the issue*. (u) The making of this transcript upon *an issue in law, is called *making up the demurrer-book*; upon an issue in fact, *making up the issue*. The demurrer-book or issue, when *made up*, (x) is delivered to the defendant's attorney; who, if it varies from the pleadings that were delivered, is entitled to make application to the court to have it set right. (y) Before dismissing the subject of this transcript, it will be proper to notice the following point

(t) In Reg. Plac. 118, *counter-plea* is defined to be "a kind of replication." See examples, 39 Edw. III. pl. 38. *Davis v. Lees*, Willes, 344.

(u) The form of the transcript in the latter case is regulated (in personal actions) by the late Rule of Court, Hil. T., 4 Will. IV. It is afterwards transcribed into the nisi prius record; q. v. post, [*79] 86. It *must contain the dates of the pleadings. *Worthington v. Wigley*, 5 Dowl. 209. *Ball v. Hamlet*, 5 Tyrw. 201; 1 C., M. & R. 575; 3 Dowl. 188, S. C.; Reg. H. 4 Will. IV. No. 1. See *Cox v. Painter*, 1 Nev. & P. 581; 6 A. & E. 491, S. C. It need not notice a plea in abatement, where there has been a subsequent plea in bar. *Pepper v. Whalley*, 4 Ad. & El. 90. [See a learned note on the practice of delivering paper books in 4 M. & G. 343.]

(x) It is the duty of the *plaintiff* (his attorney or agent) to get it made up. 1 Arch. Prac. 131, 1st ed. See Rule, H. T. 4 Will. IV.

(y) *Hart v. Dally*, 2 Dowl. 257; *Shepley v. Marsh*, Stra. 1131; *Thynne v. Woodman*, 2 Tyr. 495.

of practice with respect to the manner in which the demurrer-book, or issue, is made up and delivered. Whenever the *defendant* demurs, or traverses with a *conclusion to the country*, (that is, with an offer of trial *by jury*,) instead of returning a regular joinder in demurrer or similiter on the part of the plaintiff, before making up the demurrer-book, or issue, in the manner formerly described, (z) — the usual course (in a view to expedite the proceedings) is to make up and deliver to the defendant the demurrer-book, or issue, at once; inserting in it, however, a joinder in demurrer, or a similiter, for the plaintiff. (a) And *this, [*80] in the case of an issue in fact, is done, not in the full and regular form of a joinder in issue (as formerly given) (b) but in the following abbreviated style, viz.: — “And the said *A. B.* does the like.” Again, whenever the *plaintiff* demurs, or traverses, concluding to the country, the demurrer-book, or issue, is in like manner, made up at once, and delivered to the defendant, with a joinder in demurrer or similiter inserted for *him*, — the similiter being in the same abbreviated form — “And the said *C. D.* does the like.” There being, however, an option (as above explained) (c) with respect to the acceptance of an issue in fact, the defendant is of course entitled, if he pleases, to strike out the similiter, and demur.

During the course of the pleading, if either party perceives any mistake to have been committed in the manner of his allegation; or, if, after issue joined on demurrer for matter of form, he should think the issue likely to be decided against him, he ought to apply, without delay, for leave to *amend*. It is proper,

(z) *Suprà*, * pp. 61, 62.

(b) *Suprà*, * p. 63.

(a) 1 *Arch. Prac.* 181, 1st ed.

(c) *Suprà*, * pp. 62, 67.

therefore, now to take some notice of the law of *amendment*.

Under the ancient system, the parties were allowed to correct and adjust their pleadings during [*81] * the oral altercation, and were not held to the form of statement that they might first advance. (d) So at the present day, until the *judgment is signed*, (e) in the manner to be afterwards mentioned, either party is, in general, at liberty to *amend* his pleading as at *common law*; the leave to do which is granted as of course, (f) upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. And the court will allow an amendment at common law, in some cases, even after a demurrer has been argued. (g) Besides which, the court has a power, by *statute*, to allow an amendment after judgment has been actually signed and recorded; and of late, the judges have been much more liberal than formerly, in the exercise of this discretion. (h) Amendments are, however, always limited by due consideration of [*82] the rights of the opposite *party; and where,

(d) 2 Reeves, 439; *Rush v. Seymour*, 10 Mod. 88.

(e) 2 Arch. Prac. 281, 1st ed.; 2 Tidd, 767, 8th ed.

(f) *Rush v. Seymour*, 10 Mod. 88; 2 Tidd, 767, 8th ed. But not as of course in a *real* action. And, in general, the court will not allow an amendment in an action of that class. 2 Tidd, 755, 8th ed. *Dumaday v. Hughes*, 3 Bos. & Pul. 453. *Charlwood v. Morgan*, 1 N. R. 64, 238. *Hull v. Blake*, 4 Taunt. 572. Nor will an amendment be allowed of a plea in *abatement*. *The King v. Cooke*, 2 Barn. & Cress. 871; 1 Mann. Exch. 257.

(g) *Spincer v. Spincer*, 2 Man. & Gr. 300. *Palmer v. Gooden*, 7 Mee. & W. 488; 9 Dowl. 250, S. C. *Drewe v. Lainson*, 11 A. & E. 529; 3 P. & D. 245, S. C. *Matthews v. Taylor*, 2 Man. & Gr. 673.

(h) See *Mellish v. Richardson*, 3 Bing. 334; 1 B. & C. 819; 9 Bing. 125, S. C.

by the amendment, he would be put to unfair disadvantage, it is not allowed. (*h*)

To return to the main course of proceeding. The action being now brought to that stage at which issue is joined, the next subject for consideration is the manner in which the issue is decided. The decision of issues in *law* is vested, as it always has been, exclusively in the judges of the court. (*i*) Therefore, when upon a demurrer the demurrer-book has been made up, the next step is to *set down the demurrer for argument* in court, on some day appointed for that purpose. This may be done at request of either party; and on that day, or as soon afterwards as the business of the court will permit, it is accordingly argued *vivâ voce* in court by the respective counsel for the parties; and the judges in the same manner and place pronounce their decision according to the majority of voices. The manner of deciding issues in *fact* will require explanation at greater length.

The decision of the issue in fact is called the *trial*. (*k*) The different methods of trial now in force are the following:—The trial by jury—by the record—by certificate—and by witnesses. (*l*)

* These occur, however, in very different de- [*83]

(*h*) For the practice as to amendment, consult 2 Tidd, 753, 8th ed.

(*i*) Plow. Com. 231; Abbot of Strata Marcella's case, 9 Rep. 24.

(*k*) See Appendix, Note 24.

(*l*) The *wager of battle* was abolished by the stat. 59 Geo. III. c. 46; * the *wager of law*, by 3 & 4 Will. IV. c. 42; the trial by [*83] inspection seems incidentally swept away in the general demolition of real actions; and the case is the same with the *grand assize*, for it does not lie in a writ of right of dower. See Booth in tit. It is to be observed, that the statement in the text as to the mode of trial now in force, is to be understood as applying to the general or permanent state of the law only. For as real actions were preserved for a short prospective period, there may be some still pending, and in these, therefore, there may still be a trial by the *grand assize*.

degrees of frequency in practice. Every mode of trial, except that by jury, is of rare admissibility; being not only confined to a few questions of a *certain nature*, but in general also, if not universally, to such questions when arising in a *certain form of issue*. (*m*) And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method. (*n*) On the other hand, however, it is to be observed, with respect to these occasional modes of trial, that *when competent*, they are in general *exclusively appropriate*; so that the party by whom they are proposed in the pleading has a right to insist on their being applied, to the exclusion of the trial by jury.

[*84] *First shall be considered the ordinary method, or trial *by Jury*. (*o*)

When the parties have mutually referred the issue to decision by a jury, or (as it is technically termed) have *put themselves upon the country*, the next step, after making up the issue, is to *enter the proceedings on record*. (*p*) This is done by transcribing them on a parchment roll, called the *nisi prius* record, or record for trial, which is then to be passed and sealed by the proper officers. (*q*) Of the form in which they are entered, the following is an example:—

(*m*) Thus, whether certain persons have been *accoupled in lawful matrimony* (*accouple en loial matrimoine*) is triable by certificate of the ordinary; but if the issue be, whether the plaintiff *married the defendant's daughter ritè et legitimè*, this shall be tried by jury. So, whether a church is *full or not full* is triable by certificate; but *void or not void*, by jury. See *Fletcher v. Pynsett*, Cro. Jac. 102. *Machell v. Garrett*, 3 Salk. 64; 12 Mod. 276; S. C. Vin. Trial, (O. 6, 7,) where the last of these distinctions is said to have been adjudged, and the Year Books are cited.

(*n*) *Ilderton v. Ilderton*, 2 H. Bla. 156.

(*o*) The whole law relative to jurors and juries have been consolidated and amended under a late act of Parliament, 6 Geo. IV. c. 50.

(*p*) On the subject of *recording*, see *suprà*, *p. 25.

(*q*) It is said, that before the *nisi prius* record is sealed and passed, it

NISI PRIUS RECORD.

In the Queen's Bench.

The —— day of ——, in the year of
our Lord ——. (*The date of the
declaration.*)

—— to wit, *A. B.* the plaintiff in this suit, by *E. F.* his attorney, [*or, in his own proper person,*] complains of *C. D.* the defendant in this suit, who has been summoned to answer the plaintiff, by virtue of a writ issued on the —— *day of [*85] ——, in the year of our Lord ——, out of the court of our Lady the Queen, before the Queen herself, at Westminster. For that [*copy the declaration and pleadings, supra, * pp. 36, 37, 58, 59, 66, 67.*] And the plaintiff does the like. Thereupon the sheriff is commanded that he cause to come here on the —— day of —— twelve, &c., by whom, &c., and who neither, &c., to recognise, &c. because as well, &c.

Afterwards, on the —— day of ——, in the year ——, [*the teste of the distringas or habeas corpora,*] the jury between the parties aforesaid is respited here until the —— day of ——, [*the return day of the distringas or habeas corpora,*] unless [*the judge or judges of nisi prius (r) and assize,*] shall first come on the —— day of ——, [*the first day of sittings or commission day of assizes,*] at ——, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly. (*s*)

The first part of this entry, it will be observed, is a mere transcript of the "issue." (*t*) The clause begin-

is still necessary, as under the old practice, to enter the issue on an issue roll. Arch. Pract. 264; sed qu. if necessary. See Rule, H. T., 4 Will. IV. r. 15, and *Hodges v. Diley*, 7 Dowl. 555. *Wilks v. Dodd*, 3 Scott, 769.

(*r*) So called from the formal words *nisi prius venerint*, &c., which occur in the above entry.

(*s*) The form of this entry is now fixed by Rule of court, H. T., 4 Will. IV. It must contain the dates of the pleadings; same Rule, No. 1. And must not vary from the "issue." *Worthington v. Wigley*, 5 Dowl. 209; 3 Scott, 555, S. C. *Watts v. Ball*, 1 Man. & Gr. 208; 1 Scott's N. R. 173; 8 Dowl. 589, S. C.

(*t*) Vide *supra*, *p. 78.

ning "*Thereupon the sheriff is commanded, &c.*" is an abbreviated form intended to express the award by the court of a writ of venire facias, commanding the sheriff of the county where the facts are alleged by the [*86] pleading to have occurred, *to summon the jury to try the issue. This writ is accordingly sued out, and the direction which it gives to the sheriff, when fully expressed and without abbreviation, is as follows:—"to cause to come here forthwith twelve good and lawful men of the body of your county, qualified according to law, by whom the truth of the matter may be better known, and who are in nowise of kin either to *A. B.*, the plaintiff, or *C. D.*, the defendant, to make a certain jury of the country between the parties aforesaid, of a plea of breach of covenant, because as well the said defendant as the said plaintiff, between whom the matter in variance is, have put themselves upon that jury." (u)

Though this writ is sued out, it is not used; but it is the practice of the court to suppose that the jurors have been summoned upon it, and have failed to appear. And upon this fictitious default is founded the concluding clause of the *Nisi Prius* record, beginning with the words "*Afterwards on the ——— day of ———.*" By this clause it is intended to be expressed that a farther day is given for the jurors to appear in the court at Westminster, *unless the judge or judges of Assize* [*87] *and Nisi Prius should first come* to try the issue *in the county where the facts are alleged in the pleading to have occurred; and in conformity with this entry, another writ is issued at the same time with the

(u) See Tidd's Appendix, 316, 6th edit., and 6 Geo. IV. c. 50, s. 13, and 3 & 4 Will. IV. c. 67, which statutes now regulate the form of this writ.

Venire, called a *Distringas*, (or in the C. P. a *Habeas corpora*,) commanding the sheriff to distrain the jurors by their lands and goods, or to have their bodies, so as to enforce their appearance either before the court itself at the subsequent day, or before the judges of assize and nisi prius if they should previously come to sit in the county. (x) It is under this latter writ that the jury are in fact summoned for the trial of the cause.

In ancient times and before the introduction of the nisi prius clause, the trial used always to take place in the court itself at Westminster, and this is still indicated by the language of the venire, which directs the sheriff to summon the jury to appear *there*, and there only. But from a very remote period this course of proceeding has been disused, except in some few cases, to be presently noticed. The trial, in modern practice, generally takes place before the judge or judges of assize and nisi prius, instead of the judges of the court at Westminster; and hence the record of the proceedings made up for trial is usually made *up [*88] with a nisi prius clause, as in the preceding example, and is denominated THE NISI PRIUS RECORD. This record is delivered to the judges of assize and nisi prius as their commission for the trial of the cause, and also serves for their guidance as to the nature of the issue to be tried. The trials before these judges, called trials *at nisi prius*, (y) now take place in London and Westminster several times in the course of each term, and also during a considerable part of each vacation; in every other county they are held twice a

(x) Upon the subject of the jury process, see 2 Tidd, cxxxv. 8th edit. 6 Geo. IV. c. 50; *Rogers v. Smith*, 1 Ad. & Ell. 772. *Archbold v. Smith*, 1 M. & W. 740.

(y) See Appendix, NOTE 25.

year, and always in time of vacation. The justices of assize and nisi prius for trials in London and Middlesex consist of the chief justices of the three courts respectively, each trying only the issues from his own court. (z) For trials in the other counties they consist of such persons as are appointed for the purpose by temporary commission from the crown, among whom are usually, for each circuit, two of the judges of the superior courts, the whole kingdom being at present divided into seven circuits for the purpose.

Though the trial by jury is thus, in general, had at nisi prius, this is not universally the case; [*89] for *in causes of great difficulty and consequence, (b) these inquests are allowed to be taken before the four judges in the superior court, in which the pleading took place,—as in the ancient practice. The proceeding is then technically said to be a trial *at bar*, by way of distinction from the trial *at nisi prius*. In these cases the record is, of course, made up for trial, without any nisi prius clause, and the *distringas* directs the jury to appear in the superior court only.

By the provisions of a recent statute, the trial of an issue may now also take place *before the sheriff of the county*, in cases where the debt or demand sued for does not exceed £20; (c) but to authorize this mode of pro-

(z) But every judge of the superior courts is authorized (if there be occasion) to sit in London and Middlesex for the trial of issues arising in any of those courts, 1 Will. IV. c. 70, s. 4.

(b) Where the interest of the crown comes into question, the Attorney-General is entitled *ex officio* to demand a trial at bar, *Rowe v. Brenton*, 8 Barn. & Cres. 737. *Brown v. Lord Granville*, 1 Har. & Wol. 270. *Paddock v. Forester*, 8 Dowl. 834; 1 Man. & Gr. 583, S. C.

(c) In what case a trial before the sheriff will be allowed, see *Price v. Morgan*, 2 Mee. & Wels. 53. *Allen v. Pink*, 4 Mee. & Wels. 140; 6 Dowl. 668, S. C. *Walker v. Needham*, 4 Scott's N. R. 222. It is not applicable

ceeding, the consent of the court, or of one of the judges, must be obtained. (*d*)

* After these explanations as to the time and [*90] place of trial by jury, the next subject for consideration is the course of the proceeding itself.

The whole proceeding of trial by jury takes place under the superintendence of the presiding judge or judges, who usually decide all points as to the admissibility of evidence and direct the jury on all such points of law arising on the evidence, as is necessary for their guidance in appreciating its legal effect, and drawing the correct conclusion in their verdict.

After hearing the evidence of the witnesses, (*dd*) the addresses of counsel, and the charge of the judge, the jury pronounce their *verdict*, which the law requires to be *unanimously* given. (*e*) The verdict is usually in general terms, "for the plaintiff," or "for the defendant;" finding, at the same time, (in case of verdict for the plaintiff, and where *damages* are claimed by the action,) the amount of *damages* to which they think him entitled.

by law to any case of unliquidated damages. *Watson v. Abbot*, 4 Tyr. 64. *Jaquat v. Boura*, 5 M. & W. 155; 7 Dowl. 331, S. C. *Roffey v. Shoo-bridge*, 9 Dowl. 957. *Lawrence v. Wilcock*, 8 Dowl. 681; 11 Ad. & Ell. 911; 3 P. & D. 536, S. C. *Collis v. Groom*, 1 Dowl. N. S. 496.

(*d*) See 3 & 4 Will. IV. c. 42, ss. 17, 18, 19. As to the form of the jury process and entries on record in such cases, see R. Hil. T., 4 Will. IV. *Ward v. Peel*, 1 M. & W. 743. *White v. Farrer*, 2 M. & W. 288. *Percival v. Connell*, 3 Bing. N. C. 877; 6 Dowl. 68; [*90] 5 Scott, 91, S. C. *Lycett v. Tenant*, 4 Bing. N. C. 168; 5 Scott, 479; 6 Dowl. 436, S. C. *Farwig v. Cockerton*, 3 Mee. & Wels. 169. *Handford v. Handford*, 6 Dowl. 473.

[(*dd*) As to which party has the right to begin, see *Cripps v. Wells*, C. & Mar. 489. *Mercer v. Whall*, 5 Q. B. 447. *Ashby v. Bates*, 15 M. & W. 589. *Booth v. Millens*, 15 M. & W. 669. *Cannam v. Farmer*, 3 Ex. 698.]

(*e*) See some remarks on the principle which requires unanimity in the jury, Third Report of Com. Law Com. p. 69.

The principles upon which the law requires the jury to form their decision, are these:—

[*91] * 1. They are to take no matter into consideration but the question *in issue*; for it is to try the issue, and that only, that they are summoned. Thus, upon pleadings such as are set forth, *suprà*, * pp. 36, 37, 58, 59, 66, 67, 84, 85, they would only have to consider whether the release was executed by duress or not. Of the execution of the indenture of lease, they could not inquire, for it is not *in issue*. So, where to an action of assumpsit the defendant pleaded that he did not promise within six years, to which there was a replication that he did promise within six years, on which issue was joined; it was held not to be competent to the plaintiff to offer evidence that the action was grounded on a fraudulent receipt of money by the defendant, and that the fraud was not discovered till within six years of the action, for the issue was merely upon the promise within six years. (*f*)

2. The jury are bound to give their verdict for the party who, upon the proof, appears to them to have succeeded in establishing his side of the issue. Thus, in the same example (* pp. 84, 85), the verdict must be given for the plaintiff, if the jury think the duress is established in proof; otherwise, for the defendant. It

is to be observed, however, that there are cases [*92] in which an issue * may be found *distributively*, i.e. in part for plaintiff and in part for defendant. Thus, in assumpsit for goods sold and work done (*vide suprà*, * pp. 42, 43), if defendant pleads that he did not promise, on which issue is joined, a verdict may be

(*f*) *Clark v. Hougham*, 2 Barn. & Cres. 149. *Uther v. Rich*, 10 Ad. & Ell. 784; and see *Green v. Crane*, 11 Mod. 37. *Evans v. Ogilvie*, 2 Yo. & Jer. 79.

found for the plaintiff as to the goods, and the defendant as to the work. (g)

3. The burthen of proof, generally, is upon that party who, in pleading, maintained the *affirmative* of the issue; for a *negative* is, in general, incapable of proof. Consequently, unless he succeed in proving that affirmative, the jury are to consider the opposite proposition, or negative of the issue, as established. Thus, in the same example, it would be for the plaintiff to prove the duress; for it is he who affirms it: and if, on such proof, he fail, or offer *no* proof, the jury must find for the defendant. (h)

* Under this head comes to be considered the [*93] doctrine of *variance*. The proof offered may, in some cases, *wholly* fail to support the affirmative of the issue; but in others, it may fail by a *disagreement in some particular point or points only* between the allegation and the evidence. Such disagreement is called a *variance*; and

(g) See *Cousens v. Paddon*, 5 Tyrw. 535; 2 C., M. & R. 547, S. C. *Routledge v. Abbott*, 8 Ad. & Ell. 592. *Amor v. Cuthbert*, 1 Dowl. N. S. 160. *Williams v. Great Western Railway Company*, 8 M. & W. 856; 1 Dowl. N. S. 16, S. C. *Delisser v. Towne*, 1 Q. B. 333; for remarks on this subject, see also *Pythian v. White*, 1 Tyrw. & Gran. 515. *Knight v. Woore*, 3 Bing. N. C. 3. [*Doe d. Bowman v. Lewis*, 13 M. & W. 241. *Ford v. Beech*, 11 Q. B. 842. *Giles v. Groves*, 12 Q. B. 721.] For forms of entry of verdict on a divisible issue, see *Routledge v. Abbott*, 8 Ad. & Ell. 593. *Empson v. Fairfax*, 8 Ad. & Ell. 297. *Tidd's Practical Forms*, 319.

(h) And see an example in *Catherwood v. Chabaud*, 1 Barn. & Cres. 150. But to this rule there are some exceptions; thus, upon an issue whether a party is living or not, the party asserting the *negative*, viz., that he is *not living*, must prove the death. *Wilson v. Hodges*, 3 *East, 312. The reason is, that the presumption is in favour of [*93] life, till the contrary be shown. So, upon an issue whether a bill of exchange was accepted for consideration, the burthen of proof lies on the party asserting the negative, *Tidd's New Practice*, 423. This results from the nature of such instruments considered as mercantile securities. See other exceptions in *Phillips on Ev.* p. 492, 9th edit.

is as fatal to the party on whom the proof lies, as a total failure of evidence; the jury being bound, upon *variance*, to find the issue against him. For example: the plaintiff declared in covenant, for not repairing pursuant to the covenant in the lease; and stated the covenant, as a covenant to "repair when and as need should require;" and issue was joined on a traverse of the deed alleged. The plaintiff, at the trial, produced the deed in proof, and it appeared that the covenant was thus — to repair "when and as need should require, *and at farthest after notice*;" the latter words having been omitted in the declaration. This was held to be a variance; because the additional words were material, and qualified the legal effect of the contract.⁽ⁱ⁾ So where the plaintiff declared in assumpsit, that for certain hire and [*94] reward the *defendants undertook to carry goods from London, and deliver them safely at Dover, and the contract was proved to have been to carry and deliver safely, *fire and robbery excepted*, this was held to be a variance.^(k) On the other hand, however, the principle is not so rigorously observed, as to oblige the party, on whom the proof lies, to make good his allegation to the *letter*. It is enough if the *substance* of the issue is exactly proved.^(l) Thus, in debt on bond con-

(i) *Horsefall v. Testar*, 7 Taunt. 385.

(k) *Latham v. Rutley*, 2 Barn. & Cres. 20; and on the subject of variance, see *Woodward v. Booth*, 7 Barn. & Cres. 301. *Guthing v. Lynn*, 2 Barn. & Adol. 232. *Lamey v. Bishop*, 4 Barn. & Adol. 479. *Adams v. Bateson*, 6 Bing. 110. *Wood v. Adam*, 6 Bing. 481. *Ireland v. Johnson*, 1 Bing. N. C. 162. *Chanter v. Leese*, 5 Mee. & Wels. 698. *Davis v. Dunn*, 1 Dowl. N. S. 317. *Beech v. White*, 12 Ad. & Ell. 668; 4 Per. & Dav. 399, S. C. *Beadsworth v. Torkington*, 1 G. & Dav. 482. *Paddock v. Forrester*, 1 Dowl. N. S. 527. *Hughes v. Parker*, 8 M. & W. 244; 1 Dowl. N. S. 80, S. C.

(l) Com. Dig. Pleader, (S. 26); Vin. Ab. Evidence, (N. a. 10); B. N. P. 299; Doct. Pl. 191, 205. *Price v. Brown*, Str. 690; 1 Wils. 116, S. C. *Coare*

ditioned for payment of money, where the defendant pleaded payment of principal and interest, and the plaintiff replied, that he had not paid all the principal and interest, and issue was joined thereon; and the proof was, that the whole interest was not, in fact, paid, but that the defendant paid a sum in gross, which was accepted, in full satisfaction of the whole claim, — the issue was considered as sufficiently proved on the part of the defendant.(*m*)

* It is also to be observed, that by two recent [*95] statutes, 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, s. 23, the court is empowered to allow an amendment at the trial, in cases where the variance is not material to the merits of the case, and where there is no reason to suppose that the opposite party has been prejudiced by the mistake.(*n*)

The verdict, when given, is afterwards drawn up *in form*, and entered on the back of the record of nisi prius. This is done, upon trials in Q. B. in London and Middlesex, by the attorney for the successful party; in other cases, by an officer of the court.(*o*) Such entry is called the *postea*, from the word with which, at a former

v. Giblet, 4 East, 85; 1 Arch. 336; *Phillipps on Ev.* 190, 6th edit. *Robson v. Fallows*, 3 Hodg. 41.

(*m*) *Price v. Brown*, Str. 690; 1 Wils. 116, S. C.

(*n*) For the cases hitherto decided on these statutes, see *Tidd's New Practice*, 512, et seq. *Serjeant v. Chafy*, 5 Ad. & Ell. 354. *Whitwell v. Scheer*, 3 Nev. & Per. 398; 8 A. & E. 301, S. C. *Boys v. Ancell*, 5 Bing. N. C. 390. *Beckett v. Dutton*, 7 M. & W. 157; 8 Dowl. 865, S. C. *Smith v. Knowelden*, 9 Dowl. 402; 2 Man. & Gr. 561, S. C. *Smith v. Brandram*, 9 Dowl. 430; 2 Man. & Gr. 244, S. C. *Clark v. Morrell*, 9 Dowl. 461; 1 Man. and Gr. 841, S. C. *Doe d. Edwards v. Leach*, 9 Dowl. 877. *Gurford v. Daley*, 1 Dowl. N. S. 519; 4 Scott, N. R. 398, S. C. *Brashier v. Jackson*, 6 M. & W. 549; 8 Dowl. 784, S. C. *Parry v. Watts*, 4 Scott's N. R. 366.

(*o*) 2 Tidd, 931, 932, 8th edit.

period (when the proceedings were in Latin) it commenced. The *postea* is drawn up *in the negative or affirmative of the issue*; as will appear by the following example.

[*96]

*POSTEA.

*For the Plaintiff, on the issue, at *p. 67, 84, 85, if tried at the Assizes.*

Afterwards, that is to say, on the day, and at the place within contained, before — and —, justices of our Lady the Queen, assigned to take the assizes in and for the county of —, according to the form of the statute in such case made and provided, come as well the within named plaintiff as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say, upon their oath, that the said plaintiff was, at the time of the making of the said deed of release within mentioned, unlawfully imprisoned and detained in prison by the said defendant, until, by force and duress of that imprisonment, he the said plaintiff made the said deed of release, in manner and form as the said plaintiff hath within alleged. And they assess the damage of the said plaintiff by reason of the said breach of covenant within assigned, over and above his costs and charges by him about his suit in this behalf expended, to fifty pounds; and for those costs and charges to forty shillings. Therefore, &c.(p)

Such is the course of trial at *nisi prius*, in its direct and simple form: and the practice of a trial *at bar* is, in a general view, the same. Trials by jury, how-
[*97] ever, whether at bar or *nisi prius*, are *subject to certain varieties of proceeding, some of which require to be here noticed.

If, at the trial, a point of law arises, either as to the *legal effect* or the *admissibility* of the *evidence*, the usual course (as already stated) is for the judge to decide

these matters. But it may happen, that one of the parties is dissatisfied with the decision, and may wish to have it revised by a superior jurisdiction. If he is content to refer it to the superior court in which the issue was joined, and out of which it is sent (called, by way of distinction from the court at nisi prius, the court *in bank*,) his course is to move, in that court, for a *new trial*; a proceeding of a future or subsequent period, which will be considered hereafter in its proper place. But, as the nisi prius judge himself frequently belongs to that court, a party is often desirous, under such circumstances, to obtain the revision of some court of *error*; i. e. some court of appellate jurisdiction, having authority to correct the decision. For this purpose, it becomes necessary to put the question of law *on record*, for the information of such court of error; and this is to be done pending the trial, in a form marked out by an old statute, Westminster 2, 13 Edw. I. c. 31. The party excepting to the opinion of the judge *tenders* him a *bill of exceptions*; that is, a statement in writing of the objection made by the party to his decision; to which statement, if truly made, *the judge is [*98] bound to set his seal, in confirmation of its accuracy. The cause then proceeds to verdict, as usual, and the opposite party, for whom the verdict is given, is entitled, as in the common course, to judgment upon such verdict in the court in bank; for that court takes no notice of the bill of exceptions.(q) But the whole record being afterwards removed to the appellate court by *writ of error* (a proceeding to be hereafter explained), the bill of exceptions is then taken into consideration in the latter court, and there decided.(r)

(q) 1 Sel. 470.

(r) See the whole course of proceeding on a bill of exceptions mi-

✓ Though the judge usually gives his opinion on such points of law as above supposed, yet it may happen, that, for various reasons, he is not required by the parties, or does not wish, to do so. In such case, several different courses may be pursued for determining the question of law.

[*99] * First, a party disputing the legal effect of any evidence offered, may *demur to the evidence.*(s) A *demurrer to evidence* is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are, in general, discharged from giving any verdict;(t) and the demurrer being entered *on record*, is afterwards argued and decided in the court in bank; and the judgment there given upon it may ultimately be brought before a court of error.(u)

nutely stated, *Money v. Leach*, 3 Burr. 1692; and on the subject of bill of exceptions generally, see *Enfield v. Hills*, 2 Lev. 236. *Wright v. Sharp*, Salk. 288. *Fabrigas v. Mostyn*, 2 Black. 929. *Davies v. Pierce*, 2 T. R. 125. *Gardner v. Baillie*, 1 Bos. & Pul. 32. *Bell v. Potts*, 5 East, 49. *Phillips v. Bateman*, 16 East, 363. *Dillon v. Doe*, 1 Bing. 17. *Goode v. Harrison*, 5 Barn. & Ald. 147. *Davies v. Lowndes*, 1 Man. & Gr. 473. *Strother v. Hutchinson*, 4 Bing. N. C. 83; 5 Scott, 346; 6 Dowl. 238, S. C. *Culley v. Doe d. Taylerson*, 11 Ad. & Ell. 1008; 3 Per. & Dav. 539, S. C. *Rutter v. Chapman*, 8 Mees. & Wels. 13.

(s) 2 Tidd, 914, 8th edit. But where the question is on the *admissibility* of the evidence, the course is not by demurrer, but by bill of exceptions. "Where a judge admits that for evidence, which is not evidence, there the party must not demur; for if he doth, he admits the evidence to be good, but denieth the effects of it: and therefore, in such cases he must bring his bill of exceptions. And so it is if the judge will not admit that for evidence, which is evidence." Per Holt, C. J. *Thruston v. Slatford*, 3 Salk. 355.

(t) 1 Arch. Pract. 186, 1st edit.

(u) For full information on the subject of demurrer to evidence, see *Gibson v. Hunter*, 2 H. Bla. 187; 2 Tidd, 914, 8th edit. See the form of

A more common, because more convenient, course than this, to determine the legal effect of the evidence, is, to obtain from the jury a *special verdict*, in lieu of that *general* one, of which the form has been already described. For the jury *have an option, in- [*100] instead of finding the *negative or affirmative of the issue*, as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them*, and, after so setting them forth, to conclude to the following effect: "that they are ignorant, in point of law, on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damage at such a sum, &c.; but if the court are of an opposite opinion, then vice versâ." This form of finding is called a *special verdict*.(x) However, as on a general verdict, the jury do not themselves actually frame the *postea*, so they have, in fact, nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt; and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attornies on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion; and with respect to other particulars, according to the state of facts which it is *agreed [*101] that they *ought* to find upon the evidence be-

entering it on record, 1 Brown's Ent. 175, 176; Chit. Forms, 85; Tidd's Pract. Forms, 329. .

(x) See the form of it, Wittersheim v. Lady Carlisle, 1 H. Bl. 631. Cook v. Gerrard, 1 Saund. 171, a.

fore them. The *spécial* verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered *on record*; and the question of law arising on the facts found, is argued before the court in bank, and decided by that court, as in case of demurrer.(xx) If the party be dissatisfied with their decision, he may afterwards resort to a court of error.

It is to be observed, that it is a matter entirely in the *option of the jury*, whether their verdict shall be general or special.(y) The party objecting in point of law, cannot therefore *insist* on having a special verdict, and may consequently be driven to *demur to the evidence* — at least if he wishes to put the objection *on record*, without which no writ of error can be brought, nor the decision of a *court of error* obtained. But if the object be merely to obtain the decision of the court in bank, and it is not wished to put the legal question *on record*, in a view to a *writ of error*, then the more common (because the cheaper and shorter course) is neither to take a *special verdict*, nor *demur to the evidence*, but to take a *general verdict, subject* (as the phrase is) *to a special case*; that is, to a written statement of all the facts of [*102] *the case, drawn up for the opinion of the court in bank, by the counsel and attornies on either side, under correction of the judge at nisi prius, according to the principle of a special verdict, as above explained. The party for whom the general verdict is so given, is of course not entitled to judgment, till the court in bank has decided on the special case; and,

[(xx) It is important that all essential facts be clearly found in a special verdict. Speaking of such a verdict in *Sanders v. Vanzeller*, 4 Q. B. 260, 272, Denman, C. J., said, "We have no right to infer anything, however probable in appearance."]

(y) *Mayor of Devizes v. Clark*, 3 Adol. & Ell. 506; Litt. s. 368; 13 Edw. I., c. 30 (Westm. 2); 2 Inst. 425.

according to the result of that decision, the verdict is ultimately entered either for him or his adversary. A special case is not (like a special verdict) entered *on record*; and consequently a writ of error cannot be brought on this decision.(z)

We must now return to the course of proceeding after trial by jury, in what has been here called its direct or simple form.

The proceedings on trial by jury at *nisi prius* or *at bar* terminate with the verdict.

In case of trial at *nisi prius*, the return-day of the *last jury process, — the *distringas* or [*103] *habeas corpora*, — (which, according to the general course of other judicial writs, is made returnable into the court from which it issues) always falls on a day in term subsequent to the trial. On this day so given (which is called the *day in bank*) the parties are supposed again to appear in the court in bank, and are in a condition to receive judgment. On the other hand, in case of trial at bar, the trial takes place on or after the return-day of the last jury process; and, therefore, immediately after the trial, the parties are in court, so that judgment might be given. In either case, however, a period of four days elapses before, by the practice of the court, judgment can be

(z) It has frequently happened that the facts stated in the *special verdict* or the *special case* have all been undisputed between the parties, the only question being a question of law, whether upon such a given state of facts the issue should be decided for the plaintiff or the defendant. Where this is the case, the expense of a trial is of course superfluous. It has therefore been recently provided by 3 & 4 Will. IV., c. 42, s. 25, that where the parties, on issue joined, can agree on a statement of facts, they may, by order of a judge, draw up such statement in the form of a *special case* for the judgment of the court, without proceeding to trial.

actually obtained.(a) And, during this period, certain proceedings may be taken by the unsuccessful party to avoid the effect of the verdict. He may move the court to grant a *new trial*, or to *arrest the judgment*, or to *give judgment non obstante veredicto*, or to *award a repleader*, or to *award a venire facias de novo*.(b) Of these, briefly, in their order.

1. With respect to a *new trial*. It may happen that one of the parties may be dissatisfied with [*104] * the opinion of the *nisi prius* judge, expressed on the trial, whether relating to the effect, or the admissibility, of the evidence, — or may think the evidence against him insufficient in law, where no adverse opinion has been expressed by the judge, — and yet may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is at liberty, therefore, after the trial, and during the period above mentioned, to move the court in bank to grant a *new trial*, on the ground of the judge's having *misdirected the jury*, or having *admitted or refused evidence contrary to law*, or (where there was no adverse direction of the judge) on the ground that the jury gave their verdict *contrary to the evidence*, or *on evidence insufficient in law*. And resort may be had to the same remedy in other cases, where justice appears not to have been done at the first trial; — as where the verdict, though not wholly contrary to evidence, or on insufficient evidence in point of law, is manifestly wrong in point of discretion, as *contrary to the weight of the evidence*, and on that ground

(a) See rules H. T., 2 Will IV., 65, 67.

(b) 2 Tidd, 935, 8th edit. So the defendant, if upon the trial he obtained leave to do so, may move to *enter a nonsuit*; or the plaintiff, upon leave given at the trial, may move to *set aside a nonsuit*, and *enter a verdict for plaintiff*. Ibid.

disapproved by the nisi prius judge. (c) So a new trial * may be moved for, where a *new and* [*105] *material fact has come to light* since the trial, which the party did not know, and had not the means of proving before the jury, or where the damages given by the verdict are *excessive*, (d) or where the jury have *misconducted themselves*, as by casting lots to determine their verdict, &c. (e) In these and the like instances, the court will, on motion, and in the exercise of their discretion, under all the circumstances of the case, grant a new trial, that opportunity may be given for a more satisfactory decision of the issue. (f) A new jury process consequently issues, (g) and the cause comes on to be tried de novo. But, except on such grounds as these, tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial can never be obtained; for it is a great principle of law, that

(c) But not unless the finding is *manifestly* wrong; for where there is a contrariety of evidence, which brought the question fairly within the discretion of the jury, the court will not disturb the verdict, though disapproved by the judge who tried the cause. And "the court in granting new trials does not interfere, unless to remedy some manifest abuse, or to correct some manifest error in law or fact." *Carstairs v. Stein*, 4 M. & S. 192; and see *Swinnerton v. Marquis of Stafford*, 3 Taunt. 91, 232; [*Huxley v. Bull*, 7 M. & G. 571.]

(d) *Edgell v. Francis*, 1 Man. & Gr. 222.

(e) *Hughes v. Budd*, 8 Dowl. 315. *Roberts v. Hughes*, 7 M. & W. 399; 1 Dowl. N. S. 82, S. C. *Harvey v. Hewitt*, 8 Dowl. 598. *Morris v. Vivian*, 10 M. & W. 137.

(f) But when the sum recovered is under 20*l.*, and the trial was not before the sheriff, the court will not in general grant a new trial, unless the judge has misdirected the jury, or has received or rejected evidence improperly. *Tidd's New Practice*, 541; *Bransdon v. Didsbury*, 9 Dowl. 199. *Watson v. Reeve*, 5 Bing. N. C. 112. On trials before the sheriff the sum recovered must amount to 5*l.*, *Fleetwood v. Taylor*, 6 Dowl. 796. *Packham v. Newman*, 1 C., M. & R. 585.

(g) 2 Arch. Prac. 229, 1st edit.

the decision of a jury, upon an issue of fact, is in general irreversible and conclusive.^(h)

[*106] * 2. Again, an unsuccessful defendant may move in *arrest of judgment*; that is, that the judgment for the plaintiff be arrested or withheld, on the ground that there is some *error appearing on the face of the record*, which vitiates the proceedings.⁽ⁱ⁾ In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to this period, the court are bound to arrest the judgment.⁽ⁱⁱ⁾ It is, however, only with respect to objections apparent on the *record*, that such motion can be made. Nor can it be made, generally speaking, in respect of *formal*

^(h) The ancient law, indeed, provided one means of appeal [*106] from a *verdict of a jury in certain cases, viz. by writ of *attaint*; upon which there was a kind of new trial by twenty-four new jurors. See 3 Bla. Com. 402; 1 Reeves, 870; 2 Reeves, 117, 434; 4 Reeves, 283. But this proceeding is now abolished by 6 Geo. IV. c. 50, s. 60; and, indeed, was applicable only to a case where the jury knowingly and wilfully gave a false verdict.

⁽ⁱ⁾ Where some of the counts or breaches in a declaration are bad in law, and some good, and general damages are given, though this is an error on the face of the record, yet the court will not, by the modern practice, arrest the judgment, but award a *venire de novo*. Leach v. Thomas, 2 M. & W. 427. Airey v. Fearnside, 4 M. & W. 168; 6 Dowl. 654, S. C. Empson v. Griffin, 11 Ad. & Ell. 186; 3 Per. & Dav. 160, S. C. Gould v. Oliver, 2 Man. & Gr. 231. [In Kitchenman v. Skeel, 3 Ex. 49, it was ruled that where general damages are found on a declaration consisting of several counts, which are good, but cannot be joined, the proper course is to arrest the judgment; where some of the counts are good and others bad, a *venire de novo* issues; but in the case of a single count containing good and bad causes of action, the Court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good causes of action only.]

⁽ⁱⁱ⁾ In Atkinson v. Davies, 11 M. & W. 236, Parke, B. said that where a party, plaintiff or defendant, made an immaterial traverse to a good pleading, judgment would not be arrested or given *non obstante veredicto*. "The proper course seems in both cases to award a repleader." See also Gordon v. Ellis, 7 M. & G. 607.]

objections. This was formerly otherwise; and judgments were constantly arrested for errors of mere form; (*k*) but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind, and commonly called *the statutes of amendment and jeofails*, (*l*) by the effect of which, judgments, *at the present day, can- [*107] not, in general, be arrested for any objection of form.

3. If the verdict be for the defendant, the plaintiff, in some cases, *moves for judgment non obstante veredicto*; that is, that judgment be given in his own favour, *without regard to the verdict* obtained by the defendant. (*ll*) This motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar, of that description, and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course

(*k*) See 2 Reeves, 448; 3 Bla. Com. 407.

(*l*) The statutes of jeofails are so called from *j'ay faille*, an *expression used by the pleader of former days, when he perceived a slip in his proceeding. 3 Bla. Com. 407; *Termes de Ley*. The statutes of jeofails and amendment are—14 Edw. III. c. 6; 9 Hen. V. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. c. 12, 15; 32 Hen. VIII. c. 30; 18 Eliz. c. 14; 21 Jac. I. c. 13; 16 & 17 Car. III. c. 8; 4 & 5 Anne, c. 16; 9 Anne, c. 20; 5 Geo. I. c. 13. 3 Bla. Com. 407; 2 Tidd, 954, 8th edition.

(*ll*) In practice this motion seems almost invariably to have been made by the plaintiff, but there seems no sufficient reason why a defendant should not have the same right in an appropriate case; and in *Queen v. Governors of Darlington School*, 6 Q. B. 682, 704, Parke, B., said, "If the plaintiff by a bad replication confesses and does not avoid the matter pleaded, I cannot see why there should not be judgment *non obstante veredicto*, as well as where the defendant makes the same fault in his plea."]

the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment: while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. (*lm*) In such case, therefore, the court will give judgment for the plaintiff *without* [*108] **regard to the verdict*; and this, for the reason above explained, is also called a judgment *as upon confession*. (*m*) Sometimes it may be expedient for the plaintiff to move for judgment *non obstante*, &c., even though the verdict be *in his own favour*; for, if in such a case, as above described, he takes judgment as

[*(lm)* In later cases the motion has also been allowed not only where the defendant by an affirmative plea confesses but does not avoid the declaration, but also where besides an immaterial traverse the defendant pleads material pleas and loses the issues taken on them. *Goodburne v. Bowman*, 9 Bing. 582. *Plummer v. Lee*, 2 M. & W. 495. *Negelen v. Mitchell*, 7 M. & W. 612. *Gregory v. Brunswick*, 3 C. B. 481. *Crossfield v. Morrison*, 7 C. B. 286. *Cook v. Pearce*, 8 Q. B. 1044. *Couling v. Coxe*, 6 Dowl. & L. 399. But where the only pleas are immaterial traverses a replender is awarded. *Atkinson v. Davies*, 11 M. & W. 236. *Duke of Rutland v. Bagshawe*, 19 L. J. Q. B. 234.]

(*m*) *Gilb. C. P.* 126. *Lacy v. Reynolds*, Cro. Eliz. 214. *Staple v. Heydon*, 6 Mod. 1. *The King v. Philips*, Stra. 394. *Pitts v. Polehampton*, 1 Ld. Raym. 390. *Clears v. Stevens*, 8 Taunt. 413. *Lewis v. Clements*, 3 Barn. & Ald. 702. *Rickards v. Bennett*, 1 Barn. & Cress. 223. *Drayton v. Dale*, 2 Barn. & Cress. 293. *Earl of Lonsdale v. Nelson*, *ibid.* 302. *Lambert v. Taylor*, 4 Barn. & Cress. 138. *Gwynne v. Burnell*, 6 Bing. N. C. 453; 1 Scott's N. R. 712, S. C. *Lewis v. Reilly*, 1 Q. B. 349. *Down v. Hatcher*, 10 Ad. & Ell. 121; 2 Per. & D. 292, S. C. *Wain v. Bailey*, 10 Ad. & Ell. 616. *Harris v. Goodwyn*, 2 Man. & Gr. 405; 9 Dowl. 409, S. C. *Dixon v. Sadler*, 5 Mees. & Wels. 405, affirmed in error, 8 Mees. & Wels. 895. *Negelen v. Mitchell*, 7 Mees. & Wels. 612; 1 Dowl. N. S. 110, S. C. *West v. Blakeway*, 2 Man. & Gr. 729. *Adams v. Jones*, 12 Ad. & Ell. 459. *Rawdon v. Wentworth*, 10 M. & W. 36. [*Holford v. Hankinson*, 5 Q. B. 584. *Mittelholzer v. Fullarton*, 6 Q. B. 989. *Todd v. Stewart*, 9 Q. B. 759. And see the forms of such judgments, *Rast. Ent.* 622; 2 Rol. Ab. 99. *Jones v. Bodinner*, Carth. 370. *Wilkes v. Broadbent*, 1 Wils. 68.]

upon the verdict, it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*. (n)

4. The motion *for a repleader* is made when after issue joined and verdict thereon, (o) the pleading is found (on examination) to have miscarried, and failed to effect its proper object of raising an apt and material question between the parties. It has been shown (p) that the issue joined is *always [*109] some question raised between the parties, and mutually referred by them to judicial decision; but that point may nevertheless, on examination, be found *not proper to decide the action*. For either of the parties may, from misapprehension of law, or oversight, have passed over without demurrer a statement on the other side, insufficient and immaterial in law; and an issue in fact may have been ultimately joined on such immaterial statement; and so the issue will be immaterial, though the parties have made it the point in controversy between them. For example, if in an action of debt on bond, conditioned for the payment of ten pounds ten shillings at a certain day, the defendant pleads payment of *ten pounds*, according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon such payment, it is plain that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not, to maintain his action; for, in an action for the penalty of a bond conditioned to pay a certain sum, the only material question is,

(n) *Wilkes v. Broadbent*, 1 Wils. 63. *Dighton v. Bartholomew*, Cro. Eliz. 778; 2 Rol. Abr. 99.

(o) It is never allowed until after trial. 2 Saund. by Wms. 319 b.

(p) Vide *suprà*, *p. 59, 60.

whether the exact sum were paid or not, and a payment in part is a question quite beside the legal merits. (q) In such cases, therefore, though a verdict should have been found upon the question, the court, not knowing for whom to give judgment, will, upon motion of the unsuccessful party, *award a repleader*, that is, will order the parties to plead *de novo*, for the purpose of obtaining a better issue. (r) Upon the same principle, a repleader may become necessary where the issue has been defectively joined. Thus, where in an action on a bill of exchange, the defendant pleaded that he accepted it without consideration, and the plaintiff, instead of traversing the plea, merely added a similiter, the court, after verdict, gave the plaintiff leave to amend, but observed, that unless he did so, there must be a repleader. (s) Where a repleader is applied for on the ground of the immateriality of the issue, the cases establish the following distinction. If the immateriality is occasioned by having taken a traverse on a pleading insufficient in point of law, and which it was [*111] therefore futile to bring into *question in point

(q) *Kent v. Hall*, Hob. 118; and see another instance, *Plomer v. Ross*, 5 Taunt. 386.

(r) 2 Saund. 319 b, n. 6; Bac. Abr. Pleas, &c. (M.); Com. Dig. Pleader (R. 18.) See examples of cases in which a repleader has been awarded or refused, *Anon.* 2 Ventr. 196. *Stephens v. Cooper*, 3 Lev. 440. *Enys v. Mohun*, 2 Stra. 847. *Plomer v. Ross*, 5 Taunt. 386. *Clears v. Stevens*, 8 Taunt. 413. *Lambert v. Taylor*, 4 Barn. & Cress. 138. *Goodburne v. Bowman*, 9 Bing. 532. *Negelen v. Mitchell*, 7 M. & W. 612; 1 Dowl. N. S. 110, S. C. *Gwynne v. Burnell*, 6 Bing. N. C. 453; 1 Scott's N. R. 711, S. C. [see also note (ii), *ante*, *p. 106]; and the form of entering an award of repleader on record, Co. Ent. 42, 151, 677. *Jeffreson v. Morton*, 2 Saund. 20.

(s) *Wordsworth v. Brown*, 3 Dowl. 698. *Spong v. Wright*, 9 Mees. & Wels. 629; and see *Tampion v. Newson*, Cro. Jac. 288. *Reynall v. Heale*, 1 Vent. 122. *Smith v. Smith*, 5 Dowl. 84.

of fact, and the case be such that the pleading so traversed might be made good by a different manner of pleading, the court will award a repleader, or in some instances allow the party by whom it was pleaded, to amend. But if the pleading traversed discloses facts which shew that the case of the party is incurably bad, and could not be set right by any manner of allegation, the court will not allow a repleader, but where the party is plaintiff, will arrest the judgment, or where defendant, award judgment non obstante veredicto. (t) It is, besides, laid down in a late case, as a clear rule, that the court will never grant a repleader, except where complete justice cannot be otherwise obtained. (u) In addition to which, we may observe, that it is never granted in favour of the person who made the first fault in the pleading. (v)

5. A *venire facias de novo*, that is, a new writ of venire facias, will be awarded, when, by reason of some irregularity or defect in the proceedings on the first venire, or the trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as, for example, where the jury has been improperly chosen, or given an *uncertain, or ambiguous, [*112] or defective verdict. The consequence and object of a new venire are of course to obtain a new trial; and accordingly, this proceeding is, in substance, the same with a *motion for a new trial*. (w) Where, how-

(t) *Rex v. Philips*, 1 Str. 394. *Grills v. Ridgway*, Cro. Eliz. 318. *Rex v. Philips*, 1 Burr. 301; *Tidd's Pract.* 953. *Fancourt v. Bull*, 1 Bing. N. C. 688.

(u) *Goodburne v. Bowman*, 9 Bing. 532.

(v) 2 Saund. by Wms. 319 c. [*Doogood v. Rose*, 9 C. B. 132. But this rule only applies when the issue is found against the party who makes the first fault. *Gordon v. Ellis*, 7 M. & G. 607.]

(w) For instances, where a venire de novo will be awarded. See *Empson*

ever, the unsuccessful party objects to the verdict, in respect of some *irregularity or error in the practical course of proceeding*, rather than on the merits, the form of the application is a motion for a venire de novo, and not for a new trial. (x)

The proceedings relative to trial by jury (y) having been now considered, *the other modes of trial*, which (as has been already observed) (z) are of rare and limited application, may be dismissed in few words.

The trial by the record applies to cases where an issue of *nul tiel record* is joined in any action. If a record be asserted on one side to exist, and the opposite party deny its existence, under the form of traverse, that *there is no such record* remaining in court as [*113] alleged, and issue be joined thereon, *this is called an issue of *nul tiel record*; (a) and the court awards in such case a trial by *inspection and examination of the record*. (b) Upon this, the party affirming its existence is bound to produce it in court, on a day given for the purpose; and, if he fail to do so, judgment is given for his adversary. The trial by record is not only in use when an issue of this kind happens to

v. Griffin, 11 Ad. & Ell. 186; 3 Per. & Dav. 160. *Gould v. Oliver*, 2 Man. & Gr. 231. *Grant v. Glasier*, 1 Dowl. N. S. 58. *Lewin v. Edwards*, 1 Dowl. N. S. 639. [See also note (i) *p. 106, *ante*.]

(x) The nature of a venire facias de novo is fully explained in *Witham v. Lewis*, 1 Wils. 48.

(y) See Appendix, NOTE 26.

(z) Vide *suprà*, *p. 83.

(a) This is the proper form of issue whenever a question arises as to what has judicially taken place in a superior court of record, — for the law presumes, that if it took place, there will remain a record of the proceeding. But if the court be not of record, the issue should be directly upon the *fact* whether any such proceeding took place, and not upon the existence of any judicial memorial. See *Dyson v. Wood*, 3 Barn. & Cress. 449.

(b) See the form of the issue, 3 Chitty, 1079.

arise for decision, but it is the only legitimate mode of trying such issue, and the parties cannot put themselves *upon the country*. (c)

The trial by certificate is now of very rare occurrence, but is still in force upon certain issues; (d) one of the most important of which is the issue * of [*114] *ne unques accouple en loial matrimonie*. This arises in the *action of dower*, in which the tenant may plead in bar, that the demandant “*was never accoupled to her alleged husband in lawful matrimony*.” Issue being joined upon this, the court awards that it be tried by the diocesan of the place where the parish church, in which marriage is alleged to have been had, is situate, and that the result be certified to them by the ordinary at a given day. (b) It is said that this is a form of issue which can arise only in *dower*. (c) The trial by certificate is, when competent, the *only legitimate mode*, and the issue cannot be tried by jury. (d)

The *trial by witnesses* is in very few instances legally competent. It seems, however, that it is still applicable

(c) Co. Litt. 117, b.; Br. Trials, pl. 40. Abbot of Strata Marcella's case, 9 Rep. 31. By a recent rule of court, Hil. 4 Will. IV., a party pleading a judgment of *another* court must state in the margin of the plea, its date, and the number of the roll, or plaintiff will be at liberty to sign judgment; and on certificate of its being falsely stated, judgment may also be signed. As to the application of this rule, see *Power v. Izod*, 1 Bing. N. C. 304. *Brokenshir v. Morgan*, 9 Mees. & Wels. 111; 1 Dowl. N. S. 378, S. C. See also *Few v. Backhouse*, 8 Ad. & Ell. 789. A similar regulation had before been made as to pleading judgments of the *same* court; (1 Tidd, 636, 8th edit.)

(d) The kinds of issue on which this trial may occur are enumerated 3 Bl. Com. 333.

(b) See the form of the issue, 3 Chitty, 1219, 6th edit.; Co. Ent. 181, a.

(c) Bac. Ab. Bastardy, 516, cites 11 Hen. IV., 78. It is not allowed in personal actions. *Jones's case*, Comb. 473. *Machell v. Garrett*, 3 Salk. 64; 12 Mod. 276, S. C.; Vin. tit. Baron and Feme (D. b.) 39.

(d) *Robins v. Crutchley*, 2 Wils. 122, 127.

(as anciently) to an issue *arising on the death of the husband in an action of dower*, (e) and in some other cases. In case of trial by *witnesses*, the court, upon issue joined, awards that both parties produce in court at a given day their respective witnesses. (f) The judges [*115] examine and *decide, and the judgment is pronounced accordingly. It is, however, laid down, that, if after the evidence, the judges are still unable to satisfy themselves on the fact, they have a discretion then to send the parties *to the country*. (f)

It has now been shown in what manner the issue, whether in law or fact, is decided. It has been explained, too, by what means the unsuccessful party may, upon an issue in fact, avoid in some cases, by motion in court, the effect of the decision. Supposing, however, that such means are not adopted, or do not succeed, or that the issue be an issue in law, the next step *is the judgment*.

As the issue is the question which the parties themselves have by their pleading mutually selected for decision, they are, in general, considered as having *mutually put the fate of the cause upon that question*; and as soon, therefore, as the issue is decided in favour of one of them, that party, in general, becomes victor in the suit; and nothing remains but to award the judicial consequence which the law attaches to such success. The award of this judicial consequence is called *the judgment*, and is the province of the judges of the court.

(e) Abbott of Strata Marcella's case, 9 Rep. 30, b. Grace Faux v. Barnes, Lord Raym. 174.

(f) On this trial the affirmative must be proved by *two* witnesses at the least. 3 Bl. Com. 336.

(f) Vin. Ab. Trial (C.) 9, 10; Bac. Ab. Trial (A.) 2, 3; 3 Bl. Com. 333. See Appendix, NOTE 27.

*The nature of the judgment varies accord- [*116]
ing to the nature of the action, the plea, the
issue, and the manner and result of the decision.

It shall be first supposed that the issue is decided *for the plaintiff*.

In this case, if it be an issue in *law*, arising on a *dilatory plea*, the judgment is only, that the defendant *answer over*, (*g*) which is called a judgment of *respondeat ouster*. The pleading is accordingly resumed, and the action proceeds. This judgment, therefore, does not fall within the definition of the term just given, but is of an anomalous kind. Upon all other issues in *law*, and, in general, all issues in *fact*, the judgment is, *that the plaintiff do recover*, (*h*) which is called a judgment *quod recuperet*. The nature of such judgment, more particularly considered, is as follows. It is of two kinds; *interlocutory* and *final*. If the action *sound in damages* (according to the technical phrase), that is, be brought not for specific recovery of lands, goods, or sums of money (as is the case in real and mixed actions, or the personal actions of debt and detinue), but for *damages only*, as in covenant, trespass, &c.,—and if the issue be an issue in *law*, or any issue *in fact not tried by *jury*,—then the judgment is only that the [*117]
plaintiff ought to recover his damages, without specifying their amount; for as there has been no trial by jury in the case, the *amount* of damages is not yet ascertained. The judgment is then said to be *interlocutory*. On such interlocutory judgment the court does not, in general, itself undertake the office of assessing the damages, but issues a *writ of inquiry*, directed to the sheriff of the county where the facts are alleged by the

(*g*) Bac. Ab. Pleas, &c. (N. 4); 2 Arch. Pract. 3, 1st edit.

(*h*) Com. Dig. Abatement (I. 14), (I. 15); 2 Arch. Pract. 3, 1st edit.

pleading to have occurred, commanding him to inquire into the amount of the damage sustained, "by the oath of twelve good and lawful men of his county," and to return such inquisition when made to the court. Upon the return of the inquisition, the plaintiff is entitled to another judgment, viz. *that he recover the amount of the damages so assessed*; and this is called *final* judgment. (i) But if the issue be *in fact*, and was *tried by a jury*, then the jury, at the same time that they tried the issue, would assess the damages. (k) In this case, therefore, no writ of inquiry is necessary; and the judgment is final in the first instance, and to the same effect as just mentioned, viz. *that the plaintiff do recover the damages assessed*.

Again, if the action do not *sound in damages*, [*118] the judgment is in this *case also (in general), in the first instance, final; and to this effect, *that the plaintiff recover seisin, &c. or recover the debt, &c.* But there is, besides this, in *mixed* actions, a judgment for *damages* also; and this is either given at the same time with that for recovery of seisin, if the damages have been assessed by a jury, — or, if not so assessed, a writ of inquiry issues, and a second judgment is given for the amount found by the inquisition. (l)

The issue shall next be supposed to be decided *for the defendant*.

In this case, if the issue, whether of fact or law, arise on a *dilatory plea*, the judgment is, that the *writ* (or *declaration*) *be quashed*, — upon such pleas as are in abatement of the writ or bill, — and, that *the suit do stay or be respited until, &c.*, upon such pleas as are in *suspension*

(i) As to the proceedings on a writ of inquiry, see 2 Arch. Pract. 19, 1st edit.

(k) Vide *suprà*, *p. 96.

(l) 2 Saund. 44, n. (4); Booth, 19, 74, 75, 76.

only ; the effect, in the first case, of course, being, that the suit is defeated, but with liberty to the plaintiff to begin another in more correct form ; in the second, that the suit is suspended until the objection be removed. If the issue arise upon a *declaration* or *peremptory plea*, the judgment is, in general, *that the plaintiff take nothing, &c.*, and *that the defendant go thereof, * without day, &c.*, which is called a judgment [* 119] *of nil capiat*.

Judgment has hitherto been supposed to be awarded only *upon the decision of an issue*. There are several cases, however, in which judgment may be given, though no issue have arisen ; and these cases will now require notice. In the description given in this chapter of the manner of suit, it will be observed, that the action has been uniformly supposed to *proceed to issue* ; and this has been done to prevent digression and complexity. But an action may be cut off in its progress, and come to premature termination, by the fault of one of the parties, in failing to pursue his litigation ; and this may happen, either with the intention of abandoning the claim or defence, or from failing to follow them up within the periods which the practice of the court, in each particular case, prescribes. In such cases the opposite party becomes victor in the suit, as well as where an issue has been joined, and is decided in his favour ; and is at once entitled to judgment. Thus, in a real (though not in a personal) action, if the *defendant* holds out against the process, judgment may be given against him for *default of appearance*.^(m) So, in actions real, mixed, or personal, if, after appearance, he neither pleads nor demurs ; or if, * after plea, [* 120] he fails to maintain his pleading till issue joined,

(m) Booth, 19, 73 ; Com. Dig. Pleader (Y. 1) ; 2 Saund. 45, n. (4.)

by rejoinder, rebutter, &c., judgment will be given against him *for want of plea*, which is called judgment by *nil dicit*. So if, instead of a plea, his attorney says he is not informed of any answer to be given to the action, judgment will be given against him; and it is, in that case, called a judgment by *non sum informatus*. Again, instead of a plea, he may choose to *confess* the action; or, after pleading, he may, at any time before trial, both *confess* the action and *withdraw his plea or other allegations*; and the judgment against him in these two cases, is called a judgment *by confession*, or, by *confession relicta vereficatione*. On the other hand, judgment may be given against the *plaintiff* in any class of actions, for not declaring, or replying, or surrejoining, &c.; and these are called judgments of *non pros.* (from *non prosequitur*). So, if he chooses, at any stage of the action, after appearance and before judgment, to say that he “will not further prosecute his suit,” — or, that he “withdraws his suit,” — or, (in case of plea in abatement,) prays that his “writ” or “declaration” “may be quashed,” that he may resort to a better one, there is judgment against him of *nolle prosequi*, *retraxit*, or *cassetur breve*, or *narratio*, in these cases, respectively. Again, judgment of *nonsuit* may pass against the plaintiff: which happens when, on trial by jury, the plaintiff, on being called or demanded, at the instance of the defend-

[* 121] * ant, to be present in court while the jury give their verdict, fails to make his appearance. In this case no verdict is given; but judgment of nonsuit passes against the plaintiff. So if, after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time, as limited by the course and practice of the court in the particular case, judgment

will also be given against him for this default; and it is called judgment *as in case of nonsuit*.

These judgments by default, confession, &c., when given for the *plaintiff*, are generally *quod recuperet*; and may be either *interlocutory* or *final*, according to a distinction already explained. For the *defendant*, the form generally is *nil capiat*.

Upon judgment, in most personal and mixed actions, whether upon issue, or by default, confession, &c., it will be observed, that it forms part of the adjudication, that the plaintiff or defendant *recover his costs* of suit or defence; which costs are taxed by an officer of the court at the time when the judgment is given. (n)

*There is generally an addition too, when [*122] the judgment is for the *plaintiff*, that the defendant "*be in mercy*" (in misericordia), that is, be *amerced* or fined for his delay of justice; when for the *defendant*, that the plaintiff be *in mercy* for his false claim. (o) The practice, however, of imposing any actual amercement has been long quite obsolete.

Judgments, like the pleadings, were formerly pronounced in *open court*; and are still always *supposed* to be so. But, by a relaxation of practice, there is now, in general, except in the case of an issue in law, no actual delivery of judgment either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state

(n) It is provided by Reg. H. T., 2 Will. IV. R. 74, "that no costs shall be allowed on taxation, to a plaintiff, upon any counts or issues on which he has not succeeded, and the costs of all issues found for a defendant shall be deducted from the plaintiff's costs." See *Knight v. Moore*, 3 Hodg. 1; see also Reg. H., 4 Will. IV. R. 7, as to costs on several counts and pleas. *Head v. Baldrey*, 11 Ad. & Ell. 906; 3 Per. & Dav. 625, S. C. *Dewar v. Swabey*, 1 Gale & Dav. 397; 11 A. & E. 713, S. C. *Hazlewood v. Back*, 9 Mees. and Wels. 1.

(o) As to this amercement, see *Griesley's case*, 3 Rep. 39. *Beecher's case*, *ibid.* 59.

that, by the course of practice, he is entitled to judgment, obtains the signature or allowance of the proper officer of the court, expressing, generally, that judgment is given in his favour; and this is called *signing judgment*, and stands in the place of its actual delivery by the judges themselves. (*p*) And [* 123] * though supposed to be pronounced in court, yet judgments are frequently signed in time of *vacation* when the court is not sitting. (*q*)

Regularly, the next proceeding is *to enter the judgment on record*. Upon an issue in fact, it will be remembered, that the proceedings up to the time of the trial, have already been entered on record. (*r*) But upon signing judgment after the trial, the whole proceedings to the judgment inclusive must be again entered on a roll of parchment. And when judgment is signed, not after trial, but on demurrer, or as by default, confession, &c., there having been no record yet made up, the whole proceedings, to the judgment inclusive, are to be entered, for the first time, on a parchment roll. This proceeding is called *entering the judgment*. The entry bears date of the same day on which the judgment is signed. (*s*) Though supposed to be the act of the court,

(*p*) "The *signing* of the judgment is but the leave of the master of the office for the attorney to *enter* the judgment for his client." Styles, Pract. Reg. tit. Judgment. — On judgments by *nil dicit*, in the King's Bench and Common Pleas, the way of signing judgment is, to make an incivitur of the declaration on paper, and get it signed by one of the masters of the court; 2 Ar. Pr. by Chitty, 702, 7th ed. — On judgments after verdict in the King's Bench, the master signs the *postea* in taxing costs; and this is the signing of judgment. 1 Manning's Exch. 352, n. (*o*).

(*q*) *Lyttleton v. Cross*, 3 Barn. & Cress. 317; see 1 Will. IV. c. 7, s. 2, 3; 2 Will. IV. c. 39, s. 11; and *Engleheart v. Eyre*, 5 Barn. & Adol. 68.

(*r*) Vide *suprà*, *p. 84.

(*s*) Rule H. T., 4 Will. IV.

the duty of making the entry in proper form belongs in fact to the attorney of the successful party; and by him the roll, called the *judgment roll*, is afterwards deposited and filed of record in the treasury of the court. It is believed, however, that this proceeding of *entering the judgment on record [* 124] is very generally neglected. (*t*) Yet there are several cases in which by the course of practice it becomes essential after final judgment to do so, and in which it is therefore always actually done. (*u*)

Of the form of entry, after judgment upon issues, both in *law* and *fact*, and also after judgment by *default*, the following are examples.

ENTRY OF JUDGMENT.

For the Defendant.

Upon the Issue in law, *suprà*, * p. 61.

[*Enter the proceedings to the end of the Joinder in Demurrer, vide suprà, * p. 61, and then proceed as follows:*]

Afterwards on the —— day of —— [*day of signing final judgment,*] come the parties aforesaid by their respective attorneys aforesaid, [*or as the case may be.*] And thereupon, all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the court here, that the declaration aforesaid is not sufficient in law. Therefore, it is considered, that the plaintiff take nothing by his said declaration, but that he, and his pledges to prosecute, be in mercy, (*v*) and that the defendant do go thereof without day, &c. And it is further considered by the court here, *that [* 125] the defendant do recover against the plaintiff —— pounds, for his costs and charges by him laid out about his defence

(*t*) In order to affect lands under 1 & 2 Vict. c. 110, the judgment must be *registered* in the manner pointed out in the 19th section.

(*u*) See these cases enumerated, 2 Arch. Pract. 205, 206.

(*v*) *Vide suprà*, as to *mercy*, * p. 122.

in this behalf, by the court here adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided; and that the defendant have execution thereof, &c.

ENTRY OF JUDGMENT.

For the Plaintiff.

Upon the Issue in fact, *suprà*, *pp. 67, 84, 85,
after Trial at the Assizes.

*[Enter the proceedings as in * p. 84, to the end of the award of the venire, and then proceed as follows:]*

Afterwards the jury between the parties is respited until the ——— day of ———, [*the return day of the distringas or habeas corpora,*] unless ——— and ——— shall first come on the ——— day of ——— at ———, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear. (x) Afterwards on the ——— day of ——— [*day of signing final judgment*], come the parties aforesaid, by their respective attornies aforesaid [*or as the case may be*], and the said ——— and ———, before whom the said issue was tried, have sent hither their record had before them, in these words: to wit. (y) Afterwards, that is to say, on the day and at the place within contained, before ——— and ———, within mentioned, [*&c. as in the postea, suprà, * p. 96, to the words "forty shillings."*] Therefore it is considered that the plaintiff do [* 126] recover * against the defendant his said damages, costs, and charges, by the jurors aforesaid in form aforesaid assessed, and also ——— pounds, for his costs and charges, by the court here adjudged of increase to the plaintiff, with his assent; which said damages, costs, and charges, in the whole amount to ——— pounds. And the defendant in mercy, &c. (z)

(x) This first clause of the entry refers to the award of the *distringas*; as to which, see *suprà*, *p. 87.

(y) What next follows is a transcript of the *postea*, from the back of the *nisi prius* record. As to the *postea*, vide *suprà*, *p. 96.

(z) This form of entering judgment is prescribed by the recent Rule of Court, Hil. T. 4 Will. IV.

ENTRY OF JUDGMENT.

For the Plaintiff.

On Nil dicit.

Upon the declaration, *suprà*, * pp. 36, 37, 38.

[*Enter the proceedings as in * pp. 36, 37, 38, and then proceed as follows :*]

And the defendant says nothing in bar or preclusion of the said action of the plaintiff; whereby the plaintiff remains therein undefended against the defendant. Wherefore the plaintiff ought to recover against the defendant his damages on occasion of the premises. But because it is unknown to the court here what damages the plaintiff hath sustained by reason of the premises, the sheriff is commanded, (a) that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the plaintiff hath sustained, as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended; and that he send the inquisition which he shall thereupon take, to our said Lady the Queen, on ——— the ——— day of ——— next, wheresoever our said Lady the Queen shall then be in England, under his seal, and the *seals of those by [*127] whose oath he shall take that inquisition, together with the writ of our said Lady the Queen to him thereupon directed. The same day is given to the plaintiff at the same place. At which day, before our said Lady the Queen at Westminster, comes the plaintiff, by his attorney aforesaid. And the sheriff of ——— to wit, ——— esquire, now here, returns a certain inquisition indented, taken before him at ———, on the ——— day of ———, in the ——— year of the reign of our said Lady the Queen, by the oath of twelve good and lawful men of his bailiwick; by which it is found, that the plaintiff hath sustained damages by means of the premises to fifty pounds, over and above his costs and charges, by him about his suit in this behalf expended, and for those costs and charges to forty shillings. Therefore it is considered that the plaintiff do recover against the defendant his damages aforesaid, by the said inquisition above found; and also

(a). This is the award of the *writ of inquiry*; as to which, *vide suprà*, *p. 117.

—— pounds for his costs and charges, by the court here adjudged of increase to the plaintiff, with his assent: which said damages, costs, and charges, in the whole amount to —— pounds. And the defendant in mercy, &c. (b)

The course of the action till the entry on record of the final judgment has now been described; but the reader will not have a complete view of the history of a suit, without taking some notice of two other subsequent proceedings. These are the *writ of execution*, and the *writ of error*.

Upon judgment, the successful party is, in general, entitled to *execution*, to put in force the sentence [*128] that the law has given. For this purpose, *he sues out a writ, addressed to the sheriff, commanding him, according to the nature of the case, either to give the plaintiff possession of the lands,—or to enforce the delivery of the chattel which was the subject of the action,—or to levy for the plaintiff, the debt, or damages, and costs recovered; or to levy for the defendant his costs; and that, either upon the body of the opposite party, his lands, or goods, or, in some cases, upon his body, lands, and goods;—the extent and manner of the execution directed always depending upon the nature of the judgment.(c) Like the judgment, writs of execution are *supposed* to be actually awarded by the judges in court; but no such award is in general actually made. The successful party, after signing final judgment, sues out of the proper office a writ of execution, in the form to which he conceives he would be entitled upon such judgment *as he has entered*, if such entry has been actually made,—and, if not

(b) 1 Went. p. 244.

(c) For farther information on this subject, see 3 Bla. Com. 413.

made, then upon such *as he thinks he is entitled to enter*; and he does this (of course) upon peril that if he takes a wrong execution, the proceeding will be illegal and void, and the opposite party entitled to redress.

After final judgment is signed, the unsuccessful party may bring a *writ of error*; and this, if obtained and *allowed*, and if notice of the allowance *be [*129] served before execution, suspends (generally speaking) the latter proceeding, till the former is determined. (d) A writ of error is sued out of *Chancery*, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction, to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ, — called a writ of error *coram nobis* [or *vobis*] (e) — is, where the alleged

(d) As to the *allowance* of a writ of error, see 2 Tidd, 1199, 8th edit. R. Hil. T., 4 Will. IV.

It is also in general necessary, for the purpose of staying execution, that *bail* in error should be given. By certain statutes, 3 Jac. I. c. 8, 8 Car. I. c. 4, 13 Car. II. stat. 2, c. 2, 16 and 17 Car. II. c. 8, s. 3, and 22 and 23 Car. II. c. 4, it was provided, that no execution should be stayed by writ of error in certain cases, unless the plaintiff in error should enter into recognizance with two sufficient sureties to prosecute the same with effect, and pay the debt and costs, if judgment be affirmed, &c. And by a late statute, 6 Geo. IV. c. 98, upon *any* judgment thereafter to be given in any *personal* actions in the courts of record at Westminster, or in the counties palatine or courts in great session in Wales, execution shall not be stayed by writ of error, without special order of the court, or of some judge thereof, unless a recognizance shall first be acknowledged to the effect above stated. These statutes do not apply to errors in fact. *Birch v. Triste*, 8 East, 412. *Levy v. Price*, 2 Mees. & Wels. 533; 5 Dowl. 775, S. C. *Knight v. Thynne*, 9 Dowl. 984. *Alstrop v. Sexton*, 1 Dowl. N. S. 33. As to the amount in which bail are to be taken, see Reg. H. T., 2 Will. IV., tit. Bail.

(e) As to these terms, vide 2 Tidd, 1191, 8th edit.

error consists of matter of *fact*; the second, — called a writ of error generally — where it consists of matter of *law*.

[*130] * When a writ of error is obtained, the whole proceedings to final judgment inclusive are then always actually *entered* (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment, for some *error* of *fact* or *law* that is supposed to exist in the proceedings *as so recorded*. It will be proper here to explain in what such error may consist.

Where an *issue in fact* has been decided, there is (as formerly observed) no appeal in the English law from its decision, (*f*) except in the way of motion for new trial; and its being wrongly decided is not *error*, in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to *error* in the proceedings. For example, if the defendant has a release, but does not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts, which affect the *validity and regularity of the legal proceeding itself*; such as the defendant's having, while *under age*, appeared in the suit by *attorney*, and [*131] not by *guardian*; (*g*) or, the plaintiff's *or defendant's having been a *married woman* when

(*f*) *Supra*, *p. 105.

(*g*) *Castledine v. Mundy*, 4 B. & Adol. 90; 1 Nev. & M. 635, S. C. *Beven v. Cheshire*, 3 Dowl. 70. But if judgment is given *in favour*

[*131] *of the infant, his infancy cannot in that case be assigned for error by the plaintiff. *Bird v. Pegg*, 5 Barn. & Ald. 418.

the suit was commenced. (*h*) Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to reverse the judgment upon writ of error. To such cases, the writ of error *coram nobis* applies: "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment." (*i*)

But the most frequent case of error, is when, upon the face of the record, the judges appear to have committed a mistake *in law*. This may be, by having *wrongly decided an issue in law* brought before them by demurrer; but it may also happen in other ways. As formerly stated, (*h*) the judgment will, in general, follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*; and then to adjudge either for the plaintiff or defendant, according to the legal right, as it may on the whole appear, — notwithstanding, or * without [*132] regard to, the issue in law, or fact, that may have been raised and decided between the parties; and this, because the pleader may from misapprehension have passed by a material question of law, without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears, on the whole, not to have been done, and *judgment appears to have been given for one of the parties, when it should have been given for the other*, this will be *error in law*. (*l*) And it

(*h*) King v. Jones, 2 Ld. Raym. 1525. Per Parke, B., in Evans v. Chester, 2 Mees. & Wels. 847.

(*i*) 2 Tidd, 1191, 8th edit.; 1 Manning, 490.

(*k*) Suprà, *p. 115.

(*l*) See Bruce v. Wait, 1 Man. & Gr. 1; 1 Scott's N. R. 81.

will be equally error, whether the question was raised on *demurrer*, — or the issue was an issue in *fact*, — or there was *no issue*; judgment having been taken by default, confession, &c. In all these cases, indeed, except the first, the judges have *really* committed no error; for it may be collected, from preceding explanations, that no record, or even a copy of the proceedings, is actually brought before them, except upon demurrer; but, with respect to a writ of error, the effect is the same as if the proceedings had all actually taken place and been recorded in open court, according to the practice of ancient times. So, on the same principle, there will be error in law, if *judgment has been entered in a wrong form* inappropriate to the case; although, as

we have seen, (m) the judges have in practice [*133] nothing to *do with the entry on the roll.

But, on the other hand, nothing will be error in law that does not appear *on the face of the record*; for matters not so appearing are not supposed to have entered into the consideration of the judges. (n) Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment) but by a writ of error, requiring the record to be sent (o) into the other court of appellate jurisdiction, that the error may be there corrected, — and called a writ of error generally.

With respect to the writ of error of this latter description, it is further to be observed that it cannot be supported, unless the error in law be of a *substantial kind*. For as, by the effect of the statutes of amend-

(m) Vide *suprà*, *p. 123.

(n) 2 Inst. 426.

(o) A transcript only is sent, and not the record itself. See 11 Geo. IV., and 1 Will. IV. c. 70, s. 8. Reg. H. T., 4 Will. IV.

ments and jeofails, errors of *mere form* are no ground for *arresting the judgment*, (*p*), so, by the effect of the same statutes, such objections are now insufficient to found a *writ of error*, though at common law the case was otherwise. (*q*)

Upon a writ of error, suggesting error in law in *the proceedings of any one of the three [*134] courts, the court of appellate jurisdiction is the court of *Exchequer Chamber*, consisting of the judges of the other two courts; and from the Exchequer Chamber a writ of error may be had to the House of Lords. (*r*)

By what course of proceeding the error in the record is discussed and corrected in the appellate jurisdiction, and the judgment reversed or affirmed, it is not material to the purpose of the present treatise to explain. The reader who wishes for information on that subject, may be referred generally to the many valuable books of practice, and to the new Rules of Court, by which the whole course of proceeding upon Error is now regulated. (*s*)

(*p*) Suprà, *p. 106.

(*q*) On this subject, see 3 Bl. Com. 406, 407.

(*r*) 11 Geo. IV., and 1 Will. IV. c. 70, s. 8. This plan of appeal from each court to the other two is new, and was recommended by the Common Law Commissioners. — First Report, p. 23.

(*s*) See 2 Tidd, c. xliv., &c. 8th edit. Reg. Hil. T., 4 Will. IV. These rules were recommended by the Common Law Commissioners. See their Third Report, p. 32. See also note (1) to *Jaques v. Cesar*, 2 Saund. 100.

OF THE PRINCIPAL RULES OF PLEADING.

THE account of the course of an action being now concluded, and a view thus obtained of the general form and manner of pleading, and its connection with other parts of the suit, it is next proposed to investigate its principal or fundamental rules, and to explain their scope and tendency as parts of an entire system. For this purpose, some observations shall be premised, relative to the manner in which that system was formed, and the objects which it contemplates.

The manner of allegation in our courts may be said to have been first methodically formed, and cultivated as a science, in the reign of Edward I. From this time, the judges began systematically to prescribe and enforce certain *rules of statement*, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced. (a) None of them seem to have been originally of legislative enactment, or to have had [*136] any *authority, except usage or judicial regulation; but, from the general perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected *system of pleading*. This system, which, in its essential parts, still remains in practice unaltered,

(a) See Appendix, NOTE 28.

appears to have been originally devised in a view to certain objects or results, — which it will be necessary to the right apprehension of the subject of this chapter here to explain.

The pleadings (as appears in the preceding chapter) are so conducted, as always to evolve some question, either of fact or law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision; and the question so produced is called *the issue*. (b)

As the object of all pleading or judicial allegation is to ascertain the subject for decision, (c) so the main object of that system of pleading established in the common law of England, is to ascertain it by the production of an *issue*. And this appears to be peculiar to that system. To the best of the author's information, at least, it is *unknown in the [*137] present practice of any other plan of judicature. In all courts, indeed, the particular subject for decision must, of course, be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law.

By the general course of all other judicatures, the parties are allowed to make their statements *at large* (as it may be called), and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary, before the court can proceed to *decision*, to review, collate, and consider the opposed effect of the different statements, when com-

(b) See Appendix, NOTE 29. See also the judgment of Tenterden, C.J., in *Selby v. Bardons*, 3 Barn. & Adol. 16.

(c) Vide *suprà*, * p. 1.

pleted on either side, — to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause, — and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary medium to the preparation and adjustment of his *proofs*; and is also afterwards virtually effected by the judge, in the discharge of his general duty of *decision*: while, in some other styles of proceeding, the course is different; — the point for decision being selected from the pleadings by [*138] an act of the court, *or its officer, and judicially promulgated prior to the proof or trial.

The common law of England differs (it will be observed) from both methods, by obliging the parties to come to issue; that is, so to plead, as to develop some question, (or issue,) *by the effect of their own allegations*, and to *agree upon this question as the point for decision* in the cause; — thus rendering unnecessary any retrospective operation on the pleadings, for the purpose of ascertaining the matter in controversy.

The author is of opinion that this peculiarity of coming to issue took its rise in the practice of *oral* pleading. It seems a natural incident of that practice to compel the pleaders to short and terse allegations, applying to each other by way of answer, in somewhat of a logical form, and at length reducing the controversy to a precise point. For while the pleading was *merely* oral, and not committed by any contemporaneous record to writing, (a state of things which may be distinctly traced among the yet extant archives of the early continental jurisprudence,) the court and the

pleaders would have to rely exclusively on their memory for retaining the tenor of the discussion; and the development of some precise question or issue would then be a very convenient practice, because it would prevent the necessity of reviewing the different statements, and leave no burthen on the memory, but that of retaining the question *itself so [*139] developed. And even after the practice of recording was introduced, the same brief and logical forms of allegation would naturally continue to be acceptable, while the pleadings were still *vivâ voce*, and committed to record on the inconvenient plan of contemporary transcription. (d)

A co-operative reason for coming to issue, was the variety of the modes of decision which the law assigned to different kinds of question. The various modes enumerated in the first chapter as still recognised in practice, were, (with several others now abolished), (e) in full vigour and observance in the days of oral pleading; and evidently made it necessary to settle publicly between the parties, the precise point on which their controversy turned. For on the nature of this depended the very manner of the subsequent decision, and the form of proceeding to be instituted for that purpose. As questions of law were decided by the *judges*, and matters of fact were referred to other kinds of investigation, it was, in the first place, necessary to settle whether the question in the cause, or issue, was a matter of *law or fact*. Again, if it happened to be a matter of fact, it required to be developed in a form sufficiently specific to show what was the method *of [*140] trial appropriate to the case. And unless the state of the question were thus adjusted between the

(d) See Appendix, NOTE 30.

(e) Ibid., NOTE 27.

parties, it is evident that they would not have known whether they were to put themselves on the judgment of the court, or to go to trial; nor, in the latter case, whether they were to prepare themselves for trial by jury, or for one of the other various modes of deciding the matter of fact.

To the opinion that this distinctive feature of the English pleading was derived from the practice of oral allegation, and from that of applying different forms of trial to the determination of different kinds of question, it may, perhaps, be objected, that both these practices anciently prevailed, not only in England, but among the continental nations; among whom, nevertheless, the method of coming to issue is now unknown. This objection, however, is capable of a satisfactory answer. On the continent, the ancient system of judicature, of which these practices formed a part, was, at early periods, supplanted by the methods of the *civil law*, — in which the pleadings were *written* (*f*) — and there was but *one form of trial*, viz. a trial by the judge himself, upon examination of instruments and witnesses adduced in evidence before him. (*g*) On the other hand, in the courts of Westminster, the law of trial still [*141] *remains without material alteration; and with respect to oral pleading, though it at length grew out of fashion there, it gave place, not to allegations formed upon the principles of the imperial practice, but to supposed transcriptions from the record; the effect of which (as explained in the first chapter) (*h*) has been, to preserve in these written

(*f*) See Appendix, NOTE 31.

(*g*) Fortescue de Laud. c. 20.

(*h*) Vide *suprà*, *p. 29.

pleadings the style and method of those which were delivered *vivâ voce* at the bar of the court.

But whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practised in the English pleading, from the earliest period to which any of the now existing sources of information refer; and from the work of Glanville on the laws of England, it may clearly be shown to have existed, in effect, in the reign of Henry II. The term itself, of "*issue*," though, perhaps, somewhat less ancient, yet occurs as early as the commencement of the Year-Books, viz. in the 1st year of Ed. II.; (i) and from the same period, at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object of pleading.

* It was not, however, the *only* object. It [*142] was found, that though the parties should arrive at an issue, that is, on some point affirmed on one side and denied on the other, and mutually proposed and accepted by them as the subject for decision, it might yet happen that the point was *immaterial*; that is, *unfit to decide the action*. This, of course, rendered the issue useless. When it occurred, the proper remedy, as in the practice of the present day, was a *repleader*. (k) But it was also naturally an object to avoid its occurrence, and so to direct the pleadings as to secure the production not only of an issue, but a *material* one.

Again, it was found to be in the nature of many controversies, to admit of *more than one* question fit to decide the action; or, in other words, actions would often

(i) See Year-Book, 1 Ed. II., 14. See Appendix, NOTES 10, 32.

(k) Vide *suprà*, *p. 108, 109.

tend to more than one material issue. This might happen, in the first place, in causes which involved *several distinct claims*. Thus, if an action be brought, founded on two separate demands, for example, two bonds executed by the defendant in favour of the plaintiff, the issue may arise, as to one of them, whether it be not discharged by a subsequent release, — as to the other, whether it were not executed under duress of imprisonment — which would make it voidable in law.

[*143] So, there may be more than one material * issue in causes which involve only a *single claim*. Thus, in an action brought upon one bond only, two issues of the same kind may arise, — viz. whether it were not executed under duress of imprisonment—or whether, at any rate, if it were not, after its execution, released by the plaintiff. In the case of *several* claims, justice clearly requires, that if the cause tend to several issues distinctly applicable to each, these several issues should all be raised and decided ; for otherwise there would be no determination of the whole matters in demand. But in the case of a *single* claim, the same consideration does not apply ; for the decision of any one of the material issues that may arise upon it, will be sufficient to dispose of the entire claim. Thus, in the first example given, the finding that one bond was released, or that it was not released, would leave the demand on the other wholly untouched. On the other hand, in the second example, if the party be put to his election, either to rely on the fact of the execution under duress, or on the release, either of the questions which he so elects will lead to an issue sufficient to decide the whole claim. While several issues, therefore, must of necessity be allowed in respect of *several subjects of suit*, the allowance of more than one issue in respect of *each subject of suit*, is, in

some degree, a question of expediency. Those who founded the system of pleading took the course of not allowing more than one; and the motives *which led to this course are sufficiently obvious. [*144] For reasons already assigned, (1) it was of considerable importance to the judges, in those remote times, when the contention was conducted orally, to simplify and abbreviate the process as much as possible: and it was in this view, no doubt, that it was found expedient to establish the principle of confining the pleaders to a *single* issue in respect of each single claim; — allowing, at the same time, from necessity, of several issues, when each related to a distinct subject of demand. But whatever the reason, it is clear that, in point of fact, this principle was very early recognised in pleading, and that the issue was required not only to be *material*, but *single*.

There was still another quality essential to the issue. — that of *certainty*. This word is technically used in pleading, in the two different senses of *distinctness* and *particularity*. It is here employed in the latter sense only; and when it is said that the issue must be *certain*, the meaning is, that it must be *particular* or *specific*, as opposed to undue generality.

One of the causes, which have been above assigned for the practice of coming to issue, made it also necessary to come to issue with some degree *of certainty. The *variety in the modes of de-* [*145] *cision* required that the issue should be sufficiently certain, to show whether the point in controversy consisted of *law* or *fact*; — and if the latter, — so far to show its nature as to ascertain by what form of trial it

(1) *Supra*, *p. 38.

ought to be decided. (m) But a certainty still greater than this, was required by a cause of another kind ; viz. the *nature of the original constitution of the trial by jury*. It is a matter clear beyond dispute, (but one that has perhaps been too little noticed in works that treat of the origin of our laws,) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognisant* of them ; and who, consequently, in their verdict, gave not (as now) the conclusion of their judgment, upon facts proved before them in the cause, — but their testimony as to facts which they had antecedently known. (n) Accordingly the *venire facias*, issued to summon a jury in those days, did not (as at present), (o) direct the jurors to be summoned from the *body of the county*, but from the *immediate neighbourhood* where the facts occurred, and from among those persons *who best knew the truth of the matter*.

And the only means that the sheriff himself [*146] had of knowing what was the matter in * controversy, so as to be in a condition to obey the writ, appears to have been the *venire facias* itself ; which then stated the *nature of the issue*, instead of being confined (as now) to a short statement of the form of the action. (p) In this state of things, it was evidently necessary that the issue should be sufficiently *certain*, to show specifically the nature of the question of fact to be tried. Unless it showed (for example) at what *place* the alleged matter was said to have occurred, it would not appear into what county the *venire* should be sent, nor

(m) An illustration of this occurs in a modern case, *The King v. Cook*, 2 Barn. & Cress. 871.

(n) See Appendix, NOTE 33.

(o) Vide *supra*, *p. 86.

(p) Vide Bract. p. 309 b. 310 a. &c.

from what neighbourhood the jury were to be selected. So, if it did not specify the *time* and other particulars of the alleged transaction the sheriff would have no sufficient guide for summoning, in obedience to the venire, persons able of their own knowledge to testify upon that matter. For all these reasons, and probably for others also, connected with the general objects of precision and clearness, (q) it was considered as one of the essential qualities of the issue that it should be *certain*; and the certainty was generally to be of the degree indicated by the preceding considerations. In modern times, as the jurors have ceased to be of the nature of *witnesses*, and *are taken, generally, from the body [*147] of the county, it is no longer necessary to shape the issue for the information of the summoning officer, and accordingly, the venire facias no longer even sets the issue forth. But as the parties now prove their facts by the adduction of evidence before the jury, and have consequently to provide themselves with the proper documents and witnesses, it is as essential that they should each be apprised of the specific nature of the question to be tried, as it formerly was that the sheriff should be so instructed; and the particularity which was once required for the information of that officer, now serves for the guidance of the parties themselves in preparing their proofs. (r)

On the whole, therefore, the author conceives the chief objects of pleading to be these — *that the parties be*

(q) It is laid down by Bracton, oportet quod petens rem designet quam petit; videlicet, qualitatem, &c. item quantitatem, &c. Certam enim rem oportet deducere in iudicium, ne contingat iudicium esse delusorium vel obscurum, &c. Bract. 431 a.

(r) As to this latter or modern reason for certainty, see Collett v. Lord Keith, 2 East, 260. J'Anson v. Stuart, 1 T. R. 748. Holmes v. Catesby, 1 Taunt. 543.

brought to issue, and that the issue so produced be *material*, *single*, and *certain* in its quality. In addition to these, however, the system of pleading has always pursued those general objects also, which every enlightened plan of judicature professes to regard; — the avoidance of *obscurity* and *confusion*, — of *proximity* and *delay*.

Accordingly, the whole science of pleading, [*148] when *carefully analysed, will be found to reduce itself to certain principal or primary rules, the most of which tend to one or other of the objects above enumerated, and were apparently devised in reference to those objects; while the remainder are of an anomalous description, and appear to belong to other miscellaneous principles. It is proposed in this chapter, to collect and investigate these principal rules, and to subject them to a distribution conformable to the distinctions that thus exist between them in point of origin and object. The chapter will therefore treat :

I. Of rules which tend simply to *the production of an issue*.

II. Of rules which tend to secure the *materiality* of the issue.

III. Of rules which tend to produce *singleness* or unity in the issue.

IV. Of rules which tend to produce *certainity* or particularity in the issue.

V. Of rules which tend to prevent *obscurity* and *confusion* in pleading.

VI. Of rules which tend to prevent *proximity* and *delay* in pleading.

VII. Of certain *miscellaneous* rules. (s)

(s) See Appendix, NOTE 34.

The discussion of these principal rules will * incidentally involve the consideration of many [*149] other rules and principles, of a kind subordinate to the first, but extensive, nevertheless, and important in their application; and thus will be laid before the reader an entire, though general, view of the whole system of pleading, and of the relations which connect its different parts with each other.

SECTION I

OF RULES WHICH TEND SIMPLY TO THE PRODUCTION OF AN ISSUE.

Upon examination of the process or system of allegation by which the parties are brought to issue, as that process is described in the first chapter, (t) it will be found to resolve itself into the following fundamental rules or principles:—first, *that after the declaration, the parties must at each stage demur, — or plead by way of traverse or by way of confession and avoidance*; secondly, *that upon a traverse, issue must be tendered*; (u) lastly, *that the issue, when well tendered, must be accepted*. Either, by virtue of the first rule, a demurrer takes place, which is a tender of an issue in law; or, by the joint operation of the two first, the tender * of an [*150] issue in fact; and then, by the last of these rules, the issue so tendered, whether in fact or in law, is accepted, and becomes finally complete. It is by these rules therefore that the production of an issue is effected; and these will consequently form the subject of the following section.

(t) Vide *suprà*, * pp. 49, 68.

(u) With respect to *demurrer*, it will be remembered that it *necessarily implies* a tender of issue. *Suprà*, * p. 60.

RULE I.

AFTER THE DECLARATION, THE PARTIES MUST AT EACH STAGE DEMUR, — OR PLEAD BY WAY OF TRAVERSE, OR BY WAY OF CONFESSION AND AVOIDANCE.

This rule has two branches : —

1. The party must *demur*, or *plead*. One or other of these courses he is bound to take (while he means to maintain his action or defence) until issue be tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary ; in the former case, as by confession, — in the latter, by non pros. or nil dicit. (x)

2. If the party *pleads*, it must either be by way of *traverse*, or of *confession and avoidance*. If his [*151] *pleading amount to neither of these modes of answer, it is open to demurrer on that ground. (y)

Such is the effect of this rule, generally and briefly considered. But for its complete illustration, it will be necessary to enter much more deeply into the subject, and to consider at large the doctrines that relate both to *demurrers* and to *pleadings*.

I. Of *demurrer*.

Under this head it is intended to treat, 1. of the nature and properties of a demurrer ; 2. of the effect

(x) As to the nature of these judgments, vide *suprà*, * p. 119, 120.

(y) Est common erudition que le defendant en son respons et barre doit ou traverser ou confesser et avoier. Dy. 66, b. Et vide Reg. Plac. 59; 21 Hen. VI. 12; 5 Hen. VII. 13 a. 14 a. b.; Dyer, 66 b. 171 b. *Merceron v. Dowson*, 5 Barn. & Cress. 479. *Arlett v. Ellis*, 7 Barn. & Cress. 346. *McPherson v. Daniels*, 10 Barn. & Cress. 263, per Parke, B. *Gregory v. Hartnoll*, 1 Tyr. & Grang. 812.

of passing a fault by, without demurrer, and pleading over; 3. of the considerations which determine the pleader in his election to demur or plead.

1. Of the nature and properties of a demurrer.

A demurrer may be for insufficiency either in *substance*, or in *form*; that is, it may be either on the ground that the case shown by the opposite party is *essentially insufficient*, or on the ground *that it is stated in an *inartificial manner*; [*152] for “the law requires in every plea” (and the observation equally applies to all other pleadings) “two things;—the one, that it be in matter sufficient—the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer.” (z) And we may here take occasion to remark, that a violation of any of the rules of pleading that will be hereafter stated, is, in general, *ground for demurrer*; (a) and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only.

A demurrer, as in its *nature*, so also in its *form*, is of two kinds: it is either *general* or *special*. A general demurrer excepts to the sufficiency in general terms, without showing specifically the nature of the objection; a special demurrer adds to this, a specification of the particular ground of exception. (b) Of both these forms, the reader has already had examples in the first chapter. (c) A general demurrer is sufficient, where the objection is on matter of *substance*. A special

(z) Per Lord Hobart, *Colt v. Bishop of Coventry*, Hob. 164.

(a) In general the opposite party is not entitled to consider the defective pleading as a nullity, and to sign judgment as for want of a plea. See *Allen v. Walker*, 5 Dowl. 460.

(b) Co. Litt. 72 a.; Reg. Plac. 125, 126; Bac. Ab. Pleas, &c. (N. 5.)

(c) Vide *suprà*, *pp. 49, 50.

[*153] demurrer *is necessary where it turns on matter of *form* only; that is, where, notwithstanding such objection, enough appears to entitle the opposite party to judgment as far as relates to the merits of the cause. For, by two statutes, 27 Eliz. c. 5, and 4 Ann. c. 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges "shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same;" the latter statute adding this proviso, "so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause." Since these statutes, therefore, no mere matter of form can be objected on a general demurrer; but the demurrer must be in the special form, and the objection specifically stated. (d) But, on the [*154] other hand, it is to be *observed, that, under a special demurrer, the party may on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all such

(d) For illustrative cases to shew where a special demurrer is necessary, and where, on the other hand, a general one is sufficient. see Buckley v. Kenyon, 10 East, 139. Bowdell v. Parsons, *ibid.* 359. Bolton v. Bishop of Carlisle, 2 H. Bl. 259. Trower v. Chadwick, 3 Bing. N. C. 353. Parker v. Riley, 6 Dowl. 375; 3 Mees. & Wels. 280, S. C. Heywood v. Collinge, 9 A. & E. 268. Dayrell v. Hoare, 12 A. & E. 356; 4 P. & D. 114, S. C. Wilkins v. Boucher, 1 Dowl. N. S. 478; 4 Scott's [*154] N. R. 425. Proctor v. Sargent, 2 M. & G. 20. *Stericker v. Barker, 9 M. & W. 321; 1 Dowl. N. S. 370, S. C. Jordin v. Crump, 8 M. & W. 782. Hinton v. Dibdin, 2 G. & D. 36. A demurrer to a plea in *abatement* never needs to be special, 2 Saund. 2 b. n. (k). Post, *p. 156, note (n).

objections in substance, or regarding "the very right of the cause," (as the statutes express it,) as do not require, under those statutes, to be particularly set down. (e) It follows, therefore, that unless the objection be clearly of this substantial kind, it is the safer course, in all cases, to demur specially. (f) With respect to *the *degree* of particularity, with [*155] which, under these statutes, the special demurrer must assign the ground of objection, it may be observed, that it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, informal," or the like; but it is necessary to shew *in what respect*, uncertain, defective, or informal. (g) The concluding words, therefore, in the example formerly given, (h) "And also that the said declaration is, in

(e) 1 Chitty, 664, 6th edit.

(f) *Clue v. Baily*, 1 Vent. 240. Both on general and special demurrer, it is now necessary to specify the particular point to be argued, though the rules of pleading do not, in the former case, require it to be set forth in the demurrer itself; for by rules H. T., 38 Geo. III., T. T. 40 Geo. III. (1 East, 131), and T. T. 11 Geo. IV. (6 Bing. 802,) the exceptions intended to be insisted upon in argument, must be entered in the margin of the demurrer books, or on separate paper, previously to the argument. See *Gatliffe v. Bourne*, 5 Scott, 674. *Arbounin v. Anderson*, 1 Q. B. 498; 1 G. & D. 403, S. C. And by a recent rule, H. T., 4 Will. IV., there must be stated in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea, provided that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way. The decisions on this rule will be found in *Tidd's New Prac.* 435. *Lindus v. Pound*, 5 Dowl. 459; 2 M. & W. 240, S. C. *Perridge v. Priestley*, 5 Dowl. 306. *Whitmore v. Nicholls*, 5 Dowl. 521. *Verbecke v. Pearse*, 6 Scott, 406. *Frend v. Butterfield*, 11 A. & E. 838.

(g) 1 Saund. 160, n. (1), 337 b., n. (3). *Lambert v. Stroother*, Willes, 220. *Ross v. Robeson*, 3 Dowl. 779. *Smith v. Clinch*, 2 Gale & Dav. 225.

(h) Vide *suprà*, *p. 50.

other respects, uncertain, informal, and insufficient," (though these, or some others of similar import, are usually added,) are inoperative and useless. (i)

With respect to the *effect* of a demurrer, — it is, first, a rule, *that a demurrer admits all such matters of fact as are sufficiently pleaded.* (k) The meaning of this rule is, that the party having had his option whether to *plead* or *demur*, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse; which (as formerly shown), (l) is one [*156] of the kinds of *pleading*. *A demurrer is consequently an admission that the facts alleged are true; and therefore the only question for the court is, whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. (ll) It will be observed, however, that the rule is laid down with this qualification, that the matter of fact be *sufficiently pleaded*. For, if it be not pleaded in a formal and sufficient manner, it is said that a demurrer in this

(i) See Appendix, Note 35.

(k) Bac. Ab. Pleas, &c. (N. 3.); Com. Dig. Pleader (Q. 5). Nowlan v. Geddes, 1 East, 634. Gundry v. Feltham, 1 T. R. 334. The Gas Light & Coke Company v. Turner, 6 Bing. N. C. 324; 8 Scott, 609, S. C. Tyler v. Bland, 9 M. & W. 338; 1 Dowl. N. S. 608, S. C.

(l) Vide *suprà*, *p. 58.

[(ll) The pleader's conclusions of law are not admitted by demurrer. Thus a demurrer to a pleading which alleges that transactions took place "according to the law of Parliament," or "according to the course and practice of the said court," does not admit this last allegation. Rex v. Knollys, 1 Lord Ray. 10; Van Sandau v. Turner, 6 Q. B. 773. Other allegations for the same reason not admitted by demurrer are, that defendant was "justly entitled," Munden v. Duke of Brunswick, 10 Q. B. 656; that "it then became and was the duty of the defendant." Seymour v. Maddox, 16 Q. B. 326. Brown v. Mallett, 5 C. B. 599. "Duly," Howard v. Gosset, 10 Q. B. 359, 383; compare Paynter v. The Queen, 10 Q. B. 908, 921. See also Metcalfe v. Hetherington, 11 Ex. 257.]

case is no admission of the fact. (*m*) But this is to be understood as subject to the alterations that have been introduced into the law of demurrer by the statutes already mentioned; and therefore, if the demurrer be *general*, instead of *special*, it amounts, as it is said, to a confession, though the matter be informally pleaded. (*n*)

Again, it is a rule, *that on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it.* (*o*) Thus, on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the *plea*, they will give *judgment, not for the [*157] defendant, but the plaintiff, (*p*) provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. (*q*) This rule belongs to the general principle stated in the first chapter, (*r*) that when judgment is to be given, whether the issue be in law or fact, and whether the cause have proceeded to issue or not, the court is always bound to examine the whole record, and adjudge for the plaintiff or defendant according to the legal right, as it may on the whole appear. It is, however, subject to the following exceptions;—First, if the plaintiff demur to a *plea in*

(*m*) Com. Dig. Pleader, (Q. 6). If a plea be bad in law a demurrer to it admits no fact alleged in it. Per Abbott, C. J., in *Duncan v. Thwaites*, 3 Barn. & Cress. 584.

(*n*) 1 Saund. 337 b. n. 3; 1 Arch. Pl. 1st edit. 318. [Defects in form in a plea in abatement, however, may be taken advantage of on general demurrer. *Walden v. Holman*, 2 Lord Ray. 1015. *Esdale v. Lund*, 12 M. & W. 607.]

(*o*) Com. Dig. Pleader (M. 1), (M. 2); Bac. Ab. Pleas, &c. (A. N. 3), 5 Rep. 29 a.; 1 Saund. 285, n. (5). *Foster v. Jackson*, Hob. 56. Anon. 2 Wils. 150. *Le Bret v. Papillon*, 4 East, 502.

(*p*) Anon. 2 Wils. 150. *Thomas v. Heathorn*, 2 Barn. & Cress. 477.

(*q*) *Piggot's case*, 5 Rep. 29 a. *Bates v. Cort*, 2 Barn. & Cress. 474.

(*r*) Vide *suprà*, *p. 131.

abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration. (*s*) Secondly, though on the whole record, the right may appear to be with the plaintiff, the court will not adjudge in favour of such right, unless the plaintiff have himself put his action upon that ground. Thus, where, on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in [*158] covenant, and assigned as a breach, that *the defendant would not pay the sum awarded, — and the defendant pleaded, that, before the award made, he revoked, by deed, the authority of the arbitrators, to which the plaintiff demurred — the court held the plea good, as being a sufficient answer to the *breach alleged*, and therefore gave judgment for the defendant; although they also were of opinion, that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged, by way of breach, that the defendant prevented the arbitrators from making their award. (*t*) Thirdly, if a demurrer to the declaration be too large (as it is called), that is, be pointed to all the counts of the declaration, in a case where one of them only is defective, the court will give judgment for the plaintiff generally, notwithstanding the defective count. (*u*) Lastly, the court, in examining

(*s*) *Belasyse v. Hester*, Lutw. 1592. *Routh v. Weddell*, id. 1667. *Hastrop v. Hastings*, 1 Salk. 212. *Rich v. Pilkington*, Carth. 172.

(*t*) *Marsh v. Bulteel*, 5 Barn. & Ald. 507. See also *Head v. Baldrey*, 6 A. & E. 459; 2 N. & P. 217, S. C.

(*u*) *Ferguson v. Mitchell*, 4 Dowl. 513; 2 C., M. & R. 687, S. C. *Spyer v. Thelwall*, 1 Tyr. & G. 191; 2 C., M. & R. 692, S. C. *Price v. Williams*, 1 M. & W. 6, S. C. *Wainwright v. Johnson*, 5 Dowl. 317. *Teague v. Morse*, 2 M. & W. 599. *Webb v. Baker*, 7 A. & E. 841; 3 N. & P. 87, S. C. *Boydell v. Jones*, 4 M. & W. 446; 7 Dowl. 210, S. C. *Parrett Navigation Company v. Stower*, 6 M. & W. 564; 8 Dowl. 405, S. C.,

the whole record, to adjudge according to the apparent right, will consider only the right in *matter of substance*; and not in respect of mere *form*, such as should have *been the subject of special demurrer. [*159] Thus, where the declaration was open to an objection of form, such as should have been brought forward by special demurrer, — the plea bad in substance, and the defendant demurred to the replication, — the court gave judgment for the plaintiff in respect of the insufficiency of the plea, without regard to the formal defect in the declaration. (x)

2. Next is to be considered, the effect of pleading over without demurrer.

It has been shown that it is the effect of a demurrer to admit the truth of all matters of fact sufficiently pleaded on the other side; but it cannot be said, *e converso*, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged. On the contrary, it has been seen (y) that, upon a demurrer arising at a subsequent stage of the pleading, the court will take into consideration, retrospectively, the insufficiency in law of matters to which an answer, in fact, had been given. And in the first chapter it was shown, (z) that

and see note (a) to *Hind v. Gray*, 1 M. & G. 201. [But in *Briscoe v. Hill*, 10 M. & W. 735, Parke, B. said that where there is a demurrer to two counts or two pleas, one of which is bad, and the other good, the court ought to give judgment on the whole record, according to the truth, and not to overrule the demurrer as being too large. In *Slade v. Hawley*, 13 M. & W. 757, it was held that where there are several breaches stated in a declaration, if one breach is good the plaintiff is entitled on demurrer to judgment as to that breach, but is not entitled to judgment on the whole record on the ground that the demurrer is too large. See also 1 Man. & G. 201, n.]

(x) *Humphreys v. Bethily*, 2 Vent. 222.

(y) *Suprà*, * pp. 156, 157.

(z) *Suprà*, * pp. 106, 107, 128, 130, 131.

even after an issue in fact, and verdict thereon, the court are bound to give judgment on the whole record, [*160] and therefore to *examine the sufficiency in law of all allegations through the whole series of the pleadings; and accordingly, that advantage may often be taken by either party of a legal insufficiency in the pleading on the other side, either by motion in arrest of judgment, or motion for judgment non obstante veredicto, or writ of error, according to the circumstances of the case.

It thus appears then, that, in many cases, a party, though he has pleaded over without demurring, may, nevertheless, afterwards avail himself of an insufficiency in the pleading of his adversary. But this is not universally true. For first, it is to be observed, *that faults in the pleading are, in some cases, aided by pleading over.* (a) [If an essential allegation omitted from a pleading is expressly admitted in a subsequent pleading of the other party, the defective pleading is cured.] Thus, in an action of trespass, for taking a hook, where the plaintiff omitted to allege in the declaration that it was *his* hook, or even that it was in his possession, and the defendant pleaded a matter in confession and avoidance, justifying his taking the hook *out of the plaintiff's hand*, — the court, on motion in arrest of judgment, held, that as the plea itself shewed that the hook was in [*161] the possession of the plaintiff, *the objection, which would otherwise have been fatal, was

(a) Com. Dig. Pleader (C. 85), (E. 37); Co. Litt. 303 b.; Plow. Com. 230; Butt's case, 7 Rep. 23; Pract. Reg. 351. Drake v. Corderoy, Cro. Car. 288; Anon. 2 Salk. 519; Gilb. Hist. C. P. 137, 141. Fowle v. Welsh, 1 Barn. & Cress. 29. Fletcher v. Pogson, 3 Barn. & Cress. 192. Banks v. Angell, 7 A. & E. 843. France v. White, 1 Scott's N. R. 604; 1 M. & Gr. 731, S. C. [Fannin v. Anderson, 7 Q. B. 811. Hyde v. Watts, 12 M. & W. 254.]

cured. (b) So, if the defendant plead that he enfeoffed the plaintiff in fee upon a certain condition, and that the plaintiff broke the condition, and that for such breach he, the defendant, entered, (without showing, as he is bound to do, by what deed the condition was created); and the plaintiff replies, that after the breach of condition, and before the entry, the defendant executed a release, this replication will make good the defect in the plea. (c) And, with respect to all objections of mere *form*, it is laid down as a general proposition, "that if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer." (d) Though, on the other hand, it is a general rule, equally clear, that pleading over cannot supply a defect in matter of substance. (e) Again, it is to be observed, *that faults in the pleading are, in some cases, aided by a verdict.* (f) Thus if the

(b) *Brooke v. Brooke*, Sid. 184, cited Bac. Ab. Trespass, p. 603.

(c) *Plow. Com.* 230.

(d) Per Holt, C. J., *Anon.*, 2 Salk. 519; Bac. Ab. Pleas, &c. 322; and see *Gilb. Hist. C. P.* 137, 141. [*Mayor of Colchester v. Brooke*, 7 Q. B. 839.]

(e) *Butt's case*, 7 Rep. 23; *Gilb. Hist. C. P.* 137, 141. *Clark v. Lazarus*, 2 M. & G. 167; 2 Scott's N. R. 391, S. C. *Galloway v. Jackson*, 3 Scott's N. R. 753.

(f) *Com. Dig. Pleader*, (C. 87); 1 Saund. 288, n. (1). *Weston v. Mason*, 3 Burr. 1725. *Spieres v. Parker*, 1 T. R. 141. *Johnstone v. Sutton*, *ibid.* 545. *Nerot v. Wallace*, 3 T. R. 25. *Ward v. Harris*, 2 Bos. & Pul. 265. *Jackson v. Pesked*, 1 M. & S. 234. *Campbell v. *Lewis*, [*162] 2 Barn. & Ald. 392. *Keyworth v. Hill*, *ibid.* 685. *Pippet v. Hearn*, 5 Barn. & Ald. 634. *Lord Huntingtower v. Gardiner*, 1 Barn. & Cress. 297. *Price v. Seaman*, 4 Barn. & Cress. 525. *Payne v. Wilson*, 7 Barn. & Cress. 423. *Benfet v. Edwards*, 7 Barn. & Cress. 702. *Adamson v. Jervis*, 4 Bing. 66. *Harris v. Beavan*, 4 Bing. 646. *Nurse v. Wills*, 4 Barn. & Adol. 739. *Wilkinson v. Malin*, 2 Tyrw. 544. *Tibbits v. Yorke*, 4 Ad. & Ell. 134. *Francis v. Roose*, 3 M. & W. 191. *Wright v. Goddard*, 8 A. & E. 144. *Hughes v. Rees*, 4 M. & W. 204. *Hudson v. Nicholson*, 5 M. & W. 437. *Sheen v. Rickie*, *ibid.* 175. *Adams v. Jones*, 12 A. & E. 455; 4

[*162] grant of a reversion, a rent *charge, an advowson, or any other hereditament which lies *in grant*, and can only be conveyed by deed, be pleaded, such grant ought to have been alleged to have been made *by deed*; and if not so alleged, it will be ground of demurrer:—but if the opposite party, instead of demurring, pleads over, and issue be taken upon the grant, and the jury finds that the grant was made, the verdict aids or cures the imperfection in the pleading; and it cannot be objected in arrest of judgment or by writ of error. (g) The extent and principle of this rule, of *aider by verdict*, is thus explained in a modern decision of the Court of King's Bench:—“Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intend-

[*163] ment, * will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial.” (i) In entire accordance with this, are the observations of Mr. Serjeant Williams:—“Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such

P. & D. 174, S. C. *King v. Burrell*, 12 A. & E. 460; 4 P. & D. 207, S. C. [*Kidgill v. Moor*, 9 C. B. 364. *Hunter v. Caldwell*, 10 Q. B. 69.]

(g) 1 Saund. 228 a., n. (1). *Lightfoot v. Brightman*, Hutt, 54.

(i) *Jackson v. Pesked*, 1 M. & S. 234

as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict.” (*k*) It is, however, only where such “fair and reasonable intendment” can be applied, that a verdict will cure the objection; and therefore, if a necessary allegation be altogether omitted in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and so clearly expressed that no reasonable construction can alter its meaning, a verdict *will [*164] not aid. (*l*) Therefore, where the plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated a certain injury to have been committed,—but omitted to allege that the *reversion* was, in fact, prejudiced, or to show any grievance which, in its nature, would necessarily prejudice the reversion,—the court arrested the judgment, after a verdict had been given in favour of the plaintiff, and held the fault to be one which the verdict could not cure. (*m*) Lastly, it is to be observed, *that at certain stages of the cause, all objections of form are cured by the different statutes of jeofails and amendment*; (*n*) the cumulative effect of which is, to provide that neither after

(*k*) 1 Saund. 228, n. (1). See also as to the extent of aid by verdict. *Harris v. Goodwyn*, 2 M. & G. 405; 2 Scott’s N. R. 459; 9 Dowl. 409, S. C.

(*l*) *Jackson v. Pesked*, 1 M. & S. 234. *Nerot v. Wallace*, 3 T. R. 25. *Weston v. Mason*, 3 Burr. 1725. *Tebbutt v. Selby*, 6 A. & E. 786. *Hayter v. Moat*, 2 M. & W. 56. *Taylor v. Devey*, 7 A. & E. 403. *Davis v. Black*, 1 G. & D. 432.

(*m*) *Jackson v. Pesked*, 1 M. & S. 234.

(*n*) Vide *suprà*, * pp. 106, 133.

verdict, nor judgment by confession, nil dicit, or non sum informatus, can the judgment be arrested or reversed by any objection of that kind. Thus, in an action of trespass, where the plaintiff omits to allege in his declaration on what certain day the trespass was committed (which is a ground of demurrer), and the defendant, instead of demurring, pleads over to issue, and there is a verdict against him, the fault is [*165] *cured by the statutes of jeofails; (o) if not also by the mere effect of pleading over. So, in all cases where the objection is only that the plaintiff's title is defectively or informally stated, and defendant pleads over, it will be cured after verdict, by the statutes of jeofails, although it would be otherwise where the plaintiff's title appears to be defective in itself. (p)

3. It will now be useful to examine the considerations, by which, in a view to the state of the law, as above explained, the pleader ought to be governed, in making his election to *demur* or to *plead*.

He is first to consider whether the declaration, or other pleading opposed to him, is sufficient in substance and in form to put him to his answer. If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has *ground* for demurrer; but whether he should demur or not, is a question of expediency, to be determined upon the following views. If the pleading be insufficient in *form*, he is to consider whether it is worth while to take the [*166] *objection, recollecting the indulgence which the law allows in the way of *amendment*, (q)

(o) 3 Bl. Com. 394; 1 Saund. 228 c. n. (1), where Mr. Serjeant Williams corrects a mistake in the passage in Blackstone's Commentaries.

(p) 1 Saund. 228 b. n. (i) by Pat.; Gilbert, C. P. 137, 141, 142. Tebbutt v. Selby, 6 A. & E. 786.

(q) Vide *suprà*, * pp. 80, 81.

but also bearing in mind, that the objection, if not taken, will be aided by pleading over, or, after pleading over, by the verdict, or by the statutes of amendments and jeofails. And if he chooses to demur, he must take care to demur specially, lest, upon general demurrer, he should be held excluded from the objection. On the other hand, supposing an insufficiency in *substance*, he is to consider whether that insufficiency be in the case itself, or in the manner of statement; for, on the latter supposition, it might be removed by an amendment; and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove or not, a further question will arise, whether it be not expedient to pass by the objection for the present, and plead over. For a party, by this means, often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of afterwards urging the objection in *law*, by motion in arrest of judgment or writ of error. (r)

This double aim, however, is *not always ad- [*167] visable; for though none but *formal* objections are cured by the statutes of jeofails and amendments, there are some defects of *substance* as well as *form*, which are aided by pleading over, or by a verdict; (s) and, therefore, unless the fault be clearly of a kind not to be

(r) "When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff hath no cause of action, yet take heed that you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more will perhaps arise than you thought of, — but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact, ad ultimum; and never at first demur in law, when, after trial of the *matters in [*167] fact, the matters in law will be saved to you." Lord Cromwell's case, 4 Rep. 14 a.

(s) Vide *suprà*, *pp. 160, 161; et vide *Hitchin v. Stevens*, 2 Show. 244. *Wright v. Goddard*, 8 A. & E. 144.

so aided, a demurrer is the only mode of objection that can be relied upon. The additional delay and expense of a trial is also sometimes a material reason for proceeding in the regular way by demurrer, and not waiting to move in arrest of judgment, or to bring a writ of error. And a concurrent motive for adopting that course is, that *costs* are not allowed when the judgment is arrested, (*t*) or a repleader awarded, (*u*) nor where it is reversed upon writ of error; (*v*) (each party, in these cases, paying his own;) but on demurrer, the party succeeding obtains his costs.

Having now taken some view of the doctrine of *demurrers*, the next subject for consideration will be, that, —

II. Of *Pleadings*.

[*168] * Under this head, it is proposed to examine,

1. The nature and properties of *traverses*;
2. The nature and properties of pleading in *confession and avoidance*;
3. The nature and properties of *pleadings in general*, without reference to their quality, as being by way of traverse, or confession and avoidance.

1. Of the nature and properties of *traverses*.

Of *traverses* there are various kinds. The most ordinary kind is that which may be called a *common* traverse. It consists of a *tender of issue*; that is, of a denial, accompanied by a formal offer of the point denied, for decision; (*x*) and the denial that it makes, is by way of express contradiction, in terms of the allega-

(*t*) 1 Sel. Pract. 497. Cameron v. Reynolds, Cowp. 407.

(*u*) Plummer v. Lee, 2 M. & W. 495.

(*v*) 2 Tidd, 1243, 8th edit.

(*x*) See the definition of *tendering issue* given in the first chapter, *suprà*, *p. 59.

tion traversed. Of this kind, examples have already been given in the first chapter. (*y*)

Upon referring to these, it will be found that they are all expressed in the *negative*. That, however, is not invariably the case with a common traverse; for if opposed to a precedent negative allegation, it will, of course, be in the *affirmative*; as in the following example: —

*PLEA.

[*169]

Of the Statute of Limitations.

In Assumpsit.

(*z*) And the defendant, by — his attorney, says, that he the defendant did not, at any time within six years next before the commencement of this suit, promise in manner and form as the plaintiff hath above complained. And this the defendant is ready to verify.

REPLICATION.

And the plaintiff says, that the defendant did, within six years next before the commencement of this suit, promise in manner and form as he the plaintiff hath above complained. And this he prays may be inquired of by the country.

Besides this, the common kind, there is a class of traverses, which requires particular notice. In most of the usual actions, there is a fixed and appropriate form of plea for traversing the declaration, in cases where the defendant means to deny its whole allegations, or the principal fact on which it is founded. (*a*)

(*y*) Vide *suprà*, * pp. 58, 65, 67.

(*z*) Pleadings are always *entitled* at the commencement; i. e. have a superscription of the court, and day of the month and year, as in the examples in the first chapter; but in this and all subsequent examples, the title is, for the sake of brevity, omitted.

(*a*) Reg. Plac. 57; Doct. and Stud. 272.

This form of plea or traverse has been usually [*170] denominated *the general issue* in * that action ; and it appears to have been so called, because the issue that it tenders, involving the whole declaration, or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. But, as by the provisions of recent rules of court, (Hil. T. 4 Will. IV.) a more limited effect is allowed to such issues than formerly, the term of general issue has become rather less appropriate. From the examples of it that will be presently given, it will be found, that, in point of form, it sometimes differs from a common traverse ; for though, like that, it *tenders issue*, yet, in several instances, it does not contradict in terms of the allegation traversed, but in a more general form of expression. (b)

The first of these traverses that shall be mentioned is called the plea of *ne disturba pas.* (c) It occurs in the action of quare impedit, and is in the following form : —

And the said Bishop, C. D., and E. F., by — their attorney, say, that they do not hinder the said A. B., to present a fit person to the said church in manner and form as the said A. B. [*171] hath in his said declaration above *alleged. And of this the said Bishop, C. D., and E. F., put themselves upon the country. (d)

Another plea of the class is that of *non est factum*. It occurs in debt on bond or other specialty, and also in covenant, and is as follows : —

(b) See the general issues of *non est factum* and *not guilty*, post, *pp. 171, 172.

(c) *Colt v. Bishop of Coventry*, Hob. 162 ; *Bac. Ab. Simony*, (I.). But there is a dictum of Ashhurst, J., that there is no general issue in quare impedit. *Read v. Brookman*, 3 T. R. 158. See Appendix, NOTE 36.

(d) See *Rast. 517* ; *Winch. Ent. 703*.

And the defendant, by — his attorney, says, that the said supposed writing obligatory [or “*indenture*,” or “*articles of agreement*,” according to the subject of the action], is not his deed. And of this he puts himself upon the country.

Another of them is the plea of *never indebted*. (e) It occurs in actions of debt *on simple contract*, and its form is as follows : —

And the defendant, by — his attorney, says, that he never was indebted in manner and form as in the declaration alleged. And of this he puts himself upon the country.

Another of these traverses is called the plea of *non detinet*. It occurs in detinue, and is as follows : —

And the defendant, by — his attorney, says, that he does not detain the said goods and chattels [or “*deeds and writings*,” according to the subject of the action], in the said * declaration specified, or any part thereof, in manner and [*172] form as the plaintiff hath above complained. And of this the defendant puts himself upon the country.

Another of them is called the plea of *not guilty*. It occurs in trespass and trespass on the case *ex delicto*, (g) and is as follows : —

And the defendant, by — his attorney, says, that he is not guilty of the said trespasses, [or, *in trespass on the case*, “*the premises*”], above laid to his charge, or any part thereof, in manner and form as the plaintiff hath above complained. And of this the defendant puts himself upon the country.

(e) This form must be strictly adhered to, and a plea that he *never did owe* is irregular. *Smedley v. Joyce*, 1 Tyrw. & Gran. 84; 2 C., M. & R. 721; 4 Dowl. 421, S. C.

(g) Whether this plea may not also be pleaded in debt on a penal statute, see *Henslow v. Fawcett*, 3 Ad. & Ell. 59, n. (a); *Coppin*, q. t. v. *Carter*, 1 T. R. 642. *Faulkner v. Chevell*, 2 Har. & W. 183; 5 A. & E. 213; 6 Nev. & M. 704, S. C. *Jones v. Williams*, 4 M. & W. 375; 7 Dowl. 206, S. C.

Another of these is called the plea of *non assumpsit*. It occurs in the action of *assumpsit*, and is as follows : —

And the defendant, by — his attorney, says, that he did not promise in manner and form as the plaintiff hath above complained. And of this the defendant puts himself upon the country.

There belongs also to the same class the plea of *non cepit*. It occurs in the action of replevin, and is as follows : —

[*173] * And the defendant, by — his attorney, says, that he did not take the said cattle [*or “goods and chattels,” according to the subject of the action*], in the said declaration mentioned, or any of them, in manner and form as the plaintiff hath above complained. And of this the defendant puts himself upon the country.

According to the principle of these pleas it will be observed that (like all other traverses) they purport to be a mere *denial* of something adversely alleged. But an allowed relaxation in the modern practice had given to some of them an application more extensive than belongs to them in principle ; and the defendant had, under such issues, been permitted to give in evidence any matter of defence whatever (subject to some few exceptions) which tended to deny his liability to the action.

This abuse however has been corrected, and these pleas have been restrained to their proper and ancient province by the recent Rules of court Hil. T. 4 Will. IV. ; (*h*) and by the present state of the practice (as so

(*h*) See these Rules at large, and the reasons on which they are founded, Appendix, NOTE 37. They apply to pleas only, not to replications, *Browne v. Daubeney*, 4 Dowl. 585. *Jackson v. Robinson*, 8 Dowl. 622. They do not apply to real actions, *Miller v. Miller*, 3 Dowl. 408.

reformed) the scope and effect of the pleas in question are as follows: —

The plea of *ne disturba pas* simply denies that *the defendant obstructed the presenta- [*174] tion, and is adapted to no other ground of defence. (i)

The plea of *non est factum* denies that the deed mentioned in the declaration is the deed of the defendant. Under this, the defendant may contend at the trial, that the deed was never executed in point of fact. But he cannot under this plea deny its validity in point of law, for this should form the subject of a special allegation, showing the circumstance out of which the illegality is supposed to arise. (ii)

(i) It is consequently never pleaded, unless in cases where there has been actually no refusal to institute and induct the plaintiff's clerk. It amounts to a confession of the right of patronage; and therefore, upon such plea, the plaintiff may immediately pray judgment and a writ to the ordinary. Or, if he pleases, he may proceed in the action, to maintain the disturbance and recover damages. 1 Arch. Pl. 441, 1st edit. *Colt v. Bishop of Coventry*, Hob. 162; Bac. Ab. Simony, (I).

(ii) For the effect of this plea, see *Williams v. Bryant*, 5 M. & W. 447; 7 Dowl. 502, S. C. *Warre v. Calvert*, 7 A. & E. 143; 2 N. & P. 126, S. C. [In *North v. Wakefield*, 13 Q. B. 536, it was held that where a deed is pleaded according to its alleged legal effect, and is not set out by the plaintiff on oyer, *non est factum* puts in issue the alleged effect of the deed as well as its execution. That case was an action of debt on a promissory note for 1000*l.* The defendant pleaded that the note was the joint and several note of himself and G.; that the plaintiff by deed-poll without the defendant's consent released G. from the note, and thereby also released the defendant. The plaintiff replied *non est factum*. It was held that as the plea did not set out the deed on oyer, the replication put in issue the execution of such a deed as released the defendant, and that proof of a deed releasing G., but containing an express clause that the release of G. should not discharge any one jointly liable with him did not entitle the plaintiff to a verdict.

In debt on an award the plea of no award has been held to deny the legal effect of a supposed award. In *Dresser v. Stansfield*, 14 M. & W. 822, it was held that a special plea showing that the arbitrator had not decided on all the issues submitted to him was argumentative, and that the defence should have been shown under the plea of no award, that plea

The plea of *never indebted* is adapted to the case where the defendant means to deny in point of fact, the existence of any express contract to the effect alleged in the declaration, or to deny the matters of fact from which such contract would by law be implied. But

though under this plea he may thus contend at [*175] the trial that there was * no such contract in point of fact, he cannot insist that though made in fact, it was void in point of law; for the facts from which its invalidity is inferred, must form the subject of a special plea. It is also to be observed, that where the action is on a *bill of exchange* or a *promissory note*, the Rules of court do not permit the plea of *never indebted*, in any case.

The following points have been decided on the construction of those Rules in respect of the plea last mentioned (*j*):—

In debt for goods alleged to be sold and delivered by the plaintiff to the defendant, (see the example, *suprà*, * p. 36) the defendant was, under the plea of *never indebted*, held entitled to give in evidence that the goods were not of the quality ordered. So in debt for the value of work alleged to be done by the plaintiff for the defendant, he was considered as at liberty to show that the work was not done in such manner as ordered. (*k*) These defences are admitted under the formula “never indebted,” upon the principle that they deny the matters of fact on which the implied contract in [*176] * the declaration would arise; for in the first

putting in issue the making of a *valid* award. See also *Fisher v. Pimbley*, 11 East, 188.]

(*j*) Vide post, Sect. VI. Rule II., as to pleas amounting to the general issue.

(*k*) *Consins v. Paddon*, 5 Tyrw. 535; 4 Dowl. 488, S. C.

case there is a denial of the sale or delivery of any goods according to the order of the defendant; in the second, a denial of the performance of any work according to his order. (l) In debt for goods sold and delivered, it has been decided, notwithstanding a previous opinion to the contrary, (m) that 'under the plea of *never indebted*, the defendant may show that the goods were sold on a credit which had not expired at the time that the action was commenced. (n) - In debt for work and labour done and performed by the plaintiff as the attorney for the defendant, the latter pleaded as to the whole demand except 28*l.* 2*s.* 8*d.* *nunquam indebitatus*, and at the trial was permitted under this plea to prove that the business, in respect of which the action was brought, and which was done in a certain cause conducted by the plaintiff for the defendant, was done upon the terms, that in the event of failure in the cause, the plaintiff should make no charge except for his costs out of pocket, and that these did not exceed 28*l.* 2*s.* 8*d.* (o) This decision evidently proceeds on the principle, that beyond the sum of 28*l.* 2*s.* 8*d.*, * no work [*177] had been done by the plaintiff for the defendant, which he was bound to pay for, according to the terms of his retainer. It is therefore in accordance with the case before noticed, where under the same plea, the defendant was allowed to prove that the work was not done in such manner as ordered. (p) On the other hand it has been ruled that the defendant cannot under the plea of *nunquam indebitatus*, insist on a *set-off*, i. e. that

(l) See per Parke, B. in *Consins v. Paddon*, 4 Dowl. 493.

(m) 2 Ad. & El. 414.

(n) *Broomfield v. Smith*, 1 Mees. & W. 542.

(o) *Jones v. Reade*, 5 Dowl. 216.

(p) *Suprà*, * p. 175.

the plaintiff is indebted to him in an equal amount. This must be the subject of a special plea. (q) And the same rule also obtains where the defendant alleges payment of the debt demanded. (r)

The plea of *non detinet* alleges that the defendant does not detain "the said goods in the said declaration specified," &c. It operates accordingly as a denial of the detention of the goods in question by the defendant. But, under this form of plea, the defendant cannot deny that the goods were the plaintiff's property. (s)

[*178] * The plea of *not guilty* in *trespass* evidently amounts to a denial of the trespasses alleged,

(q) *Graham v. Partridge*, 1 Tyrw. & G. 754.

(r) See Reg. Gen. Hil. T., 4 Will. IV.; T. T., 1. Vict. And for other instances of what may or must be given in evidence under *nunquam indebitatus*, see *Wagstaffe v. Sharpe*, 3 M. & W. 521. *Willis v. Langridge*, 5 A. & E. 383. *Jones v. Reade*, *ibid.* 529. *Garey v. Pyke*, 10 A. & E. 512. *Fricker v. Thomlinson*, 1 M. & G. 772. *Bussey v. Barnett*, 9 M. & W. 312; 1 Dowl. N. S. 646, S. C. *Belbin v. Butt*, 2 Mees. & W. 422. [Under this plea the defendant was allowed to show that the goods for the price of which the action was brought were sold for cash, which was paid at the time of the sale. *Bussey v. Barnett*, 9 M. & W. 312. Payment in advance may be shown. *Smith v. Winter*, 12 C. B. 487. In an action of debt for calls on shares, the defendant was held entitled to prove that notice of the calls was not duly given, *Waterford, &c. Railway Co. v. Logan*, 14 Q. B. 672; but not that the company was not regularly formed. *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432.]

(s) *Richards v. Frankum*, 6 M. & W. 420. *Jones v. Dowle*, 9 M. & W. 19; 1 Dowl. N. S. 391, S. C. [A few other points established in regard to the pleadings in this action are as follows: Detain in the declaration means an adverse detention, not a bare holding possession, and the statement of a bailment on the declaration is formal only, and cannot be traversed. *Clements v. Flight*, 16 M. & W. 42. The defendant cannot, under a plea denying the plaintiff's property in the goods forming the subject of the action, prove that he himself as well as the plaintiff had some right in the goods either as tenant in common, *Mason v. Farnell*, 12 M. & W. 674, or because of a lien, *Barnewall v. Williams*, 7 M. & G. 403. The contrary decision of *Lane v. Tewson*, 1 Gale & Dav. 584, is overruled. See also *Dirks v. Richards*, 4 M. & G. 574. *Whitehead v. Harrison*, 6 Q. B. 423. *Austin v. Kelle*, 1 Ex. 586.]

and no more. Therefore, if in trespass for assault and battery, the case be, that the defendant has *not* assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but, if his case be of any other description, the plea will be inapplicable. (*ss*) So, in trespass *quare clausum fregit*, or *de bonis asportatis*, if the defendant did not, in fact, break and enter the close in question, or take the goods, the general issue, "not guilty," will be proper. But, under this form of plea, the defendant cannot in trespass *quare clausum fregit* deny the plaintiff's possession or right of possession of the close; (*t*) nor in trespass *de bonis asportatis*, the plaintiff's property in the goods. (*tt*)

[*(ss)* In *Christopherson v. Bare*, 11 Q. B. 473, an action of trespass for assault and false imprisonment, the defendant pleaded affirmatively leave and license of the plaintiff. It was held on special demurrer that as regarded the assault the plea was equivalent to not guilty, and it was questioned whether the plea was not bad for the same reason as regards the imprisonment. See also, illustrating the distinction stated in the text, *Gibbons v. Pepper*, 1 Lord Ray. 387. *Knapp v. Salisbury*, 2 Camp. 500. *Milman v. Dolwell*, 2 Camp. 378. *Boss v. Litton*, 5 C. & P. 407. *Pearcy v. Walter*, 6 C. & P. 232. *Hall v. Fearnley*, 3 Q. B. 919. *Cotterill v. Starkey*, 8 C. & P. 691.]

(*t*) See *Heath v. Milward*, 2 Bing. N. C. 98. *Browne v. Dawson*, 12 A. & E. 624; 4 P. & D. 355, S. C. As to plaintiff's right to full costs on this plea, where the damages are under 40s., see *Hughes v. Hughes*, 1 Tyrw. & Gran. 4. *Smith v. Edwards*, 4 Dowl. 621. *Dunnage v. Kemble*, 3 Bing. N. C. 538. *Purnell v. Young*, 3 M. & W. 288. *Pugh v. Roberts*, *ibid.* 458. *Jones v. Thomas*, 11 A. & E. 193; 8 Dowl. 99; 3 P. & D. 91, S. C. See also 3 & 4 Vict. c. 24.

[*(tt)* But see *Forman v. Dawes*, Car. & M. 127. In trespass *quare clausum fregit*, under the plea of "not possessed" (that the close was not the close of the plaintiff) in *Whittington v. Boxall*, 5 Q. B. 139, it was held that the plaintiff's case was established by proof of possession, and that evidence of title offered by the defendant was inadmissible. In *Jones v. Chapman*, 2 Ex. 803, 18 L. J. Ex. 456, S. C., however, this case was overruled, and evidence of title in one under whom the defendant claimed was held admissible. *Coleridge* and *Wightman*, JJ. dissented. This decision seems inconsistent with the allowance of the affirmative plea of *liberum tenementum*, under which the defendant

The plea of *not guilty* in *trespass on the case* operates as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant. (u)

[*179] Thus, if the declaration be as in * the example, *p. 44, the defendant may, under the plea of not guilty, deny at the trial, the publication of the libel, and also that it was published with such meaning as alleged. (uu)

might set up the same defence. *Harvey v. Brydges*, 14 M. & W. 437, 1 Ex. 261. In this case Parke, B. says that the plea of *liberum tenementum* was invented for the purpose of forcing a plaintiff who did not set out in his declaration the *locus in quo* particularly to make a new assignment setting out the abutments of his close, and that the plea thus introduced was subsequently allowed although the declaration set out the abutments of the plaintiff's close. See further in regard to the plea of *liberum tenementum*, *Holford v. Bailey*, 13 Q. B. 426, 436. *Ryan v. Clark*, 14 Q. B. 65. In *trespass de bonis asportatis*, "not possessed" puts in issue property as well as possession. *Richards v. Symons*, 8 Q. B. 90. *Harrison v. Dixon*, 12 M. & W. 142. In the former case (at p. 94) Wightman, J. said, "In an action for personal chattels, the plea denying property in the plaintiff means that he has no property as against the defendant."

In *trespass* for seduction, the defence that the person seduced was not the plaintiff's servant was held properly set up by a specific traverse of that allegation in the declaration. *Torrence v. Gibbins*, 5 Q. B. 297. But see *Holloway v. Abell*, 7 C. & P. 528.]

(u) For what "not guilty" puts in issue, in *trespass on the case*, and what may be given in evidence under that plea, see *Wright v. Lainson* 2 M. & W. 739. *Coles v. Bank of England*, 10 A. & E. [*179] *437. *Marriott v. Stanley*, 1 M. & G. 568. *Hounsfield v. Drury*, 11 A. & E. 98. *Norton v. Scholefield*, 9 M. & W. 665; 1 Dowl. N. S. 638, S. C.

For what "not guilty" does *not* put in issue, in *trespass on the case*, and what cannot be given in evidence under it, see *Wheatley v. Patrick*, 2 M. & W. 650. *Lewis v. Alcock*, 3 M. & W. 188. *Watkins v. Lee*, 5 M. & W. 270. *Hart v. Crowley*, 12 A. & E. 378. *Taverner v. Little*, 5 B. N. C. 678.

[(uu) In an action on the case for libel or slander that the communication was privileged may be shown under the general issue. *Lillie v. Price*, 5 A. & E. 645. *Hoare v. Silverlock*, 9 C. B. 20. In an action for negligence, proof of contributory negligence on the part of the defendant was allowed under the same plea. *Bridge v. Grand Junction Railway*

But the denial here referred to must be a denial in *point of fact*; for no matter of defence is admissible under the plea of "*not guilty*," if, admitting the act complained of, it merely tends to show that it was not *wrongful* or no breach of duty. Thus in an action of trespass on the case, for diverting the water from the plaintiff's mill, (see example, *suprà*, * p. 46,) the defendant pleaded not guilty, and upon this the question arose, whether it put in issue the mere fact of the diversion of the water, or whether the defendant was entitled also to deny the plaintiff's right to the use of the stream as claimed. It was argued for the defendant, that the word "*wrongfully*," as used in the declaration, was part of the substantive charge, and that the plea of not guilty, therefore, had the effect of denying the wrong so alleged; which made it competent to the defendant to show that the plaintiff * had no such [*180] right to the stream as he claimed, for then the act of diversion could be no "*wrong*" to the plaintiff. The Court of King's Bench, thinking the point one on which it was desirable to establish an uniformity of practice, conferred with the other judges, and came to the

Company, 3 M. & W. 244. *Holden v. Liverpool Gas Co.*, 3 C. B. 1. *Dakin v. Brown*, 8 C. B. 92. In an action for an injury caused by a ferocious dog, the "*scienter*" is put in issue by that plea. *Thomas v. Morgan*, 2 C. M. & R. 496. *Card v. Case*, 5 C. B. 622. And under the general issue in an action for a nuisance, it might be shown not only the erection, but also the alleged damage. *Norton v. Scholefield*, 9 M. & W. 665. And so in other actions where special damage is essential to the cause of action. *Eastwood v. Bain*, 3 H. & N. 738. *Williams v. Mostyn*, 4 M. & W. 145. *Wilby v. Elston*, 8 C. B. 142. But see *Wylie v. Birch*, 4 Q. B. 566. *Needham v. Fraser*, 1 C. B. 815. See also *Card v. Case*, *suprà*, at *p. 629, per Maule, J. "Not guilty cannot put the biting in issue, that is the act of the dog." But in an action for malicious prosecution, the favorable termination of the prosecution could only be put in issue by a specific traverse. *Watkins v. Lee*, 5 M. & W. 270. *Atkinson v. Raleigh*, 3 Q. B. 79. *Haddrick v. Heslop*, 12 Q. B. 267.]

conclusion, that in cases like this, the word "wrongfully" does not bring the title into issue, under a plea of not guilty; and that in the instance before them, the plea consequently denied nothing but the fact of diversion. (v) So, where in *trover* (w) the defendant pleaded not guilty, the Court of Exchequer held, that it was not competent to him under that plea to prove that he was tenant in common with the plaintiff of the goods in question, and sold them with his consent. They were of opinion that the plea of not guilty must be understood as a mere denial of the alleged conversion *in point of fact*, and not as a denial of a *wrongful* conversion; but the defence proposed, went to show that the defendant had in fact converted the goods, and to insist that he did so under a lawful title. (x) So, where in the like action it was proved that the defendant had in fact converted the goods, the plaintiff was held entitled to a verdict on the plea of not [*181] guilty, though it was also * proved that before the time of such conversion he had parted with his property in the goods. (y)

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Cooper
(contra)

(v) *Frankum v. Lord Falmouth*, 2 Ad. & Ell. 452.

(w) As to what "not guilty" in *trover* puts in issue, see *Barton v. Brown*, 5 M. & W. 298. *White v. Teale*, 12 A. & E. 106; 4 P. & D. 43, S. C.

(x) *Stancliff v. Hardwick*, 5 Tyr. 551.

(y) *Vernon v. Shipton*, 2 Mees. & W. 9. [But in *Higgins v. Thomas*, 8 Q. B. 908, on special demurrer an affirmative plea setting up joint ownership by the plaintiff and defendant was held bad as either amounting to the general issue or admitting a conversion (such as destruction of the chattel) and failing to avoid it. And in *Young v. Cooper*, 6 Ex. 259, an affirmative plea justifying the defendant's taking by virtue of a writ of execution was held bad as an argumentative denial of the conversion. The earlier case of *Stancliffe v. Hardwick* was overruled, Parke, B. saying, "In *Stancliffe v. Hardwick*, we held that a conversion in fact was put in issue by the plea; but we have since come to the conclusion that our opinion in that case was erroneous. A conversion *ex vi*

Whatever defence tends to deny in point of fact the whole substance or any substantial part of the injury complained of in the declaration, is a denial of the wrongful act, or breach of duty, within the meaning of the Rules, and is admissible under "not guilty." Thus, in an action on the case for maliciously indicting the plaintiff without probable cause, it was held, that under the plea of not guilty, the defendant was at liberty to prove the existence of probable cause; the want of probable cause being a substantial part of the injury complained of. (z) So, in a like form of action, where the declaration stated that the defendant wrongfully

termini means a wrongful conversion." See also *White v. Teale*, 9 L. J. Q. B. 377. *Wilkinson v. Whalley*, 5 M. & G. 590. *Whitmore v. Greene*, 13 M. & W. 104. *Mayhew v. Herrick*, 7 C. B. 229. The doctrine expressed in *Young v. Cooper*, which if literally followed would enable any defence except one showing the discharge of an existing right of action to be shown under the general issue, was somewhat qualified in *Jones v. Davies*, 6 Ex. 663, where the court refused to allow under this plea evidence that the goods were given by the defendant to the plaintiff subject to a condition which had not been performed, wherefore the defendant retook them. It was urged that this evidence showed the defendant not guilty of a wrongful conversion, but it was held "not guilty means not guilty of such an act as would, if the goods were the plaintiff's, be a wrongful conversion. . . . There may be some property in the defendant, and still the conversion may be wrongful, as in the case of a joint tenancy." Per Alderson, B. at p. 665.

Under the plea of "not possessed," any evidence tending to show that the defendant was entitled to the possession of the goods, as against the plaintiff, was admissible. *Owen v. Knight*, 4 Bing. N. C. 54. *Chase v. Goble*, 2 M. & G. 930. *Howarth v. Tollemache*, 4 M. & G. 427. *Leake v. Loveday*, 4 M. & G. 972. *Isaac v. Belcher*, 5 M. & W. 139. *Nicolls v. Bastard*, 2 C. M. & R. 659. *Gregg v. Wells*, 10 A. & E. 90. *Webb v. Tripp*, 1 Dowl. N. S. 589. *Ringham v. Clements*, 12 Q. B. 260. In *Newnham v. Stevenson*, 10 C. B. 713, it was discussed whether *jus tertii* could be shown as a defence under this plea, and a distinction in this respect was taken between trespass and trover.

In *White v. Spettigue*, 13 M. & W. 603, it was said that the defence that the goods were stolen and that the plaintiff had not prosecuted the thief to conviction ought to be specially pleaded.]

(z) *Cotton v. Browne*, 3 Ad. & Ell. 312.

kept dogs, knowing them to be accustomed to chase and kill cattle, and that the dogs, while so kept, chased and killed divers cattle of the plaintiff, the defendant, upon a plea of not guilty, was held entitled to insist that no sufficient proof had been given of his knowledge of the propensities of the dogs in question; the *scienter* being of the substance of the wrongful act which was the subject of complaint, and consequently put in issue by a plea of not guilty. (a) So, in an action for a libel, where the defence was that the [*182] alleged libel was a privileged *communication between attorney and client, the Court of King's Bench held, on conference with the other judges, that this was a matter the defendant was at liberty to insist upon under "not guilty." (b) So, in an action on the case for the seduction of the plaintiff's daughter, *per quod servitium amisit*, the defendant was allowed under the same plea, to insist that the daughter was not her father's servant. (c) On the other hand, where the matter denied is not of the substance of the charge, but merely introductory matter, or (as the phrase is) matter of *inducement* only, it is not brought into issue by the plea of not guilty. Thus in the example (*p. 44) the defendant cannot, under this plea, deny that the action mentioned in the declaration had been tried, or that the plaintiff had been examined as a witness; but if he means to deny these matters, must do so in terms. So, where the declaration in trespass on the case alleged that the defendant had maliciously and without probable cause, proceeded to make the plaintiff an outlaw, and that the outlawry had been since

(a) *Thomas v. Morgan*, 1 Tyrw. 1085.

(b) *Lillie v. Price*, 5 Dowl. 432; 5 A. & E. 645.

(c) *Holloway v. Abell*, 7 Car. & P. 528. But see note (u), *p. 178.

reversed: it was held that the defendant could not, under the plea of not guilty, dispute the reversal of the outlawry; the only question raised by the plea * being, whether the defendant had proceeded [*183] maliciously and without probable cause.(d) So where, in an action of trespass on the case, the plaintiff declared that he was possessed of a close and pond, and that the defendant was possessed of a close used as a private road, and adjoining the pond, and that he wrongfully made in his close a sewer, near to the plaintiff's pond, and thereby diverted the water from it, it was held, that, under the plea of not guilty, the defendant could not object that his close was not used as a private road at the time of the grievance, as alleged in the declaration; for that even if the point were material, (which it was not,) it was mere matter of inducement, and could not therefore, under the New Rules, be denied under the general issue.(e)

The plea of *non-assumpsit* operates as a denial in point of fact, of the existence of any express promise to the effect alleged in the declaration, (ee) or of the matters

(d) *Drummond v. Pigou*, 2 Bing. N. C. 114.

(e) *Dukes v. Gostling*, 1 Bing. N. C. 588.

[(ee) If on the issue raised by *non-assumpsit* the plaintiff proves a contract differing in any material respect from that declared on, he cannot recover; and conversely if the defence relied on is that the plaintiff has stated inaccurately the contract between the parties, such defence must be pleaded under the general issue. *Whittaker v. Mason*, 2 Bing. N. C. 359. *Morgan v. Pebrer*, 3 Bing. N. C. 457. *Sharland v. Leifchild*, 4 C. B. 529. *Williams v. Vines*, 6 Q. B. 355. *Weedon v. Woodbridge*, 13 Q. B. 470. *Brind v. Dale*, 2 M. & W. 775. *Nash v. Breeze*, 11 M. & W. 352. *Heath v. Durant*, 12 M. & W. 438. *Mounsey v. Perrott*, 2 Ex. 522. If, however, the defendant's promise is qualified by a stipulation in the form of a condition subsequent, defeasance or collateral stipulation, this is not treated as part of the principal promise and need not be stated in the declaration, but must be affirmatively pleaded by the defendant. *Clarke v. Gray*, 6 East, 564. *Smart v. Hyde*, 8 M. & W. 723. *Jones v. Clarke*, 3 Q. B. 194. *Sieveking v. Dutton*, 3 C. B. 331.]

of fact from which the promise alleged would be implied by law. (*f*) But under this plea the defendant cannot insist that though a contract was made as alleged, it is invalid in point of law, for this must form the subject of a special allegation, showing the [*184] circumstances out * of which the illegality is supposed to arise. (*g*) And it is to be observed, that if the declaration be upon a *bill of exchange* or *promissory note*, (*h*) the Rules of court above referred

(*f*) See *Wallis v. Broadhurst*, 4 Ad. & Ell. 877. [The plea of *non-assumpsit* puts in issue not simply the making of the promise declared on, but the making of it for the consideration alleged. *Lyall v. Higgins*, 4 Q. B. 528. *Sutherland v. Pratt*, 11 M. & W. 296. *Bell v. Welch*, 9 C. B. 154. If the defendant in fact made the promise alleged in the declaration in return for the consideration alleged, and the defence relied on is the insufficiency in law of the consideration, *non-assumpsit* should not, it seems, be held a proper way of setting up the defence. If the legal insufficiency of the consideration appears on the face of the declaration, a demurrer would bring this before the court. If the legal insufficiency of the consideration results from facts not stated in the declaration, such facts ought to be pleaded affirmatively. *Passenger v. Brookes*, 1 Bing. N. C. 587, S. C.; 1 Scott, 560. *De Pinna v. Polhill*, 8 C. & P. 78. But there is authority for allowing the defendant to prove any facts showing the insufficiency of the consideration under the plea of *non-assumpsit*. See *Sutherland v. Pratt*, 11 M. & W. 296. *Hannuic v. Goldner*, 11 M. & W. 849. *Raikes v. Todd*, 8 A. & E. 846, 854. *Wade v. Simeon*, 2 C. B. 548.]

(*g*) *Martin v. Smith*, 4 Bing. N. C. 436. *Fenwick v. Laycock*, 1 Q. B. 414; 1 G. & D. 27, S. C. [But see *Hannuic v. Goldner*, 11 M. & W. 849. That was an action of *assumpsit* for not accepting shares. The defendant pleaded: 1. That the contract was made in France, and that by the law of France one who does not own a thing cannot sell it, and that the plaintiff did not own the shares in question. 2. That the contract was made in the form of a bona fide transaction, but was intended as a wager on the price of public securities, and that such contracts are invalid by the law of France. It was held on special demurrer that the pleas were bad as amounting to *non-assumpsit*.

If the plaintiff declares on a written contract as it was actually made, the defence that the writing had been altered by the addition of a seal must be pleaded affirmatively. *Davidson v. Cooper*, 11 M. & W. 778.]

(*h*) As in the examples, *suprà*, * pp. 40, 41.

to prohibit the use in any case of this form of plea, and require that the defendant should deny specially such part of the declaration as he means to traverse. Therefore he should deny the drawing, indorsing, or accepting the bill, &c. (according to the nature of the case,) in terms. (i)

The following points are among the most important and illustrative of those decided on the construction of the New Rules *with respect to the plea of non-assumpsit*. (k)

In *indebitatus assumpsit* (l) for goods bargained and sold, the Court held, that the defendant was at liberty under *non-assumpsit* to prove that by the terms of the contract the goods were to be shipped *for [*185] him under certain conditions, which had not been complied with, and that he had consequently refused to accept them. (m) This doctrine, it will be observed, is conformable to the decision already referred to in regard to the plea of *never indebted*. (n) The defence was admissible, because it denied the matter of fact on which the declaration attempted to raise an implied promise, for it denied the bargain and sale of any goods according to the order given. So in *indebitatus assumpsit* for the use and occupation of premises alleged to be occupied by the defendant by the plain-

(i) See *Sewell v. Dale*, 8 Dowl. 309. *Fraser v. Newton*, *ibid.* 773. See also *Donaldson v. Thompson*, 6 M. & W. 316; 8 Dowl. 209, S. C. [*Weeks v. Argent*, 16 M. & W. 817.]

(k) See post, Sect. VI. Rule II. as to pleas amounting to the general issue.

(l) *Indebitatus assumpsit* is that species of the action of assumpsit in which the plaintiff first alleges a debt, and then a promise in consideration of the debt. The promise so laid is generally an implied one only. See the form of a declaration in *indebitatus assumpsit*, *suprà*, * p. 40.

(m) *Gardner v. Alexander*, 3 Dowl. 146. And see *Groundsell v. Lamb*, 2 Gale, 28. [*Dawson v. Collis*, 10 C. B. 523.]

(n) See *suprà*, * p. 175.

tiff's permission, it was held, that under *non-assumpsit* the defendant might give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff the future rent, the Court being of opinion that this amounted to a denial of the matter of fact, from which the implied promise in the declaration was supposed to arise, viz. that the defendant occupied the premises by the permission of the plaintiff. (o) In *indebitatus assumpsit* for money had and received by the defendant to the plaintiff's use, (see the example, *suprà*, *p. 42,) it was held that the defendant may, under this plea, not only deny the receipt of the [*186] * money, but give in evidence any special circumstances which tend to rebut the legal implication, that the money was had and received to the use of the plaintiff. (p) It is indeed the express provision of the New Rules, that in this species of action *non-assumpsit* shall "operate as a denial, both of the receipt of the money and the existence of those facts, which make such receipt by the defendant a receipt to the use of the plaintiff." (q)

In *indebitatus assumpsit* on an account stated, the defendant was, under the plea of *non-assumpsit*, not allowed to prove that by a subsequent account stated between the plaintiff and him, the balance was in his favour. Such defence tends only to show that the

(o) *Waddilove v. Barnett*, 2 Bing. N. C. 538. [And in such an action brought by an assignee of the original lessor, an affirmative plea of payment to the defendant's original lessor without notice of the assignment was held to amount to the general issue. *Cook v. Moylan*, 1 Ex. 67.]

(p) *Moore v. Eddowes*, 7 Car. & P. 203. [*Williams v. Vines*, 6 Q. B. 355. *Owen v. Challis*, 6 C. B. 115. *Coupland v. Challis*, 2 Ex. 682.]

(q) R. G. H. 4 Will. IV.

balance on the first account was discharged by payment or set-off, and if so, the payment or set-off should be specially pleaded as in the case of the action of debt. (*r*)

We have already seen, that defences which, admitting the transaction declared upon to have taken place in fact, rely on its being void or voidable in point of law, are not admissible in evidence under the general issue, but must be specially pleaded (*s*): and it has been decided that this *applies not only to [*187] the case where the declaration is founded on an express promise of an illegal description, but to the case where the declaration is founded on an implied promise, and the services or considerations upon which the implication is supposed to arise, were tainted with illegality. (*t*) So where the transaction is not itself illegal, but the plaintiff's right to recover is taken away in consequence of his non-compliance with some statutory regulation, it was held, that the defendant cannot avail himself of such objection under the general issue, but must raise it by way of special plea. Thus, in *assumpsit* against a carrier for the loss of a parcel, the defendant cannot insist under *non-assumpsit* that the parcel was above 10*l.* value, and that no notice of its value was given at the time of its being delivered, as required by 11 Geo. IV. and 1 Will. IV. c. 68. (*u*) But

(*r*) *Fidget v. Penny*, 4 Tyrw. 650, and *supra*, *p. 177. But incorrectness of the account may be shown under this plea. *Thomas v. Hawkes*, 8 M. & W. 140.

(*s*) *Supra*, *pp. 183, 184.

(*t*) *Potts v. Sparrow*, 1 Bing. N. C. 594.

(*u*) *Syms v. Chaplin*, 5 Dowl. 429; 5 A. & E. 634, S. C. Et vide *Alcock v. Taylor*, 2 Harr. & Wol. 58. *Barnett v. Glossop*, 1 Bing. N. C. 633. *Moore v. Dent*, 1 Mood. & R. 112. [A defence given by the Statute of Frauds should not be pleaded affirmatively, but should be shown under the general issue. *Buttermere v. Hayes*, 3 M. & W. 244. *Leaf v. Tuton*, 10 M. & W. 398. *Reade v. Lamb*, 6 Ex. 130.]

it has, on the other hand, been decided that the non-compliance on the part of the plaintiff, with a statutory regulation, need not be specially pleaded by the defendant where that non-compliance disables the plaintiff, by the express terms of the statute, from proving his case. Thus in *indebitatus assumpsit* for the amount of an apothecary's bill, the defendant may under [*188] *non-assumpsit* object that the * plaintiff has not proved that he had obtained a certificate of his being qualified to practise; for the statute 55 Geo. III. c. 194, s. 21, provides, that without such proof no apothecary shall recover his charges. The objection is in fact founded on a defect in the evidence on the part of the plaintiff, and not on a matter which the defendant relies upon by way of defence. (v)

Lastly, the plea of *non cepit* applies to the case where the defendant has not, in fact, taken the cattle or goods, or where he did not take them, or have them, in the *place* mentioned in the declaration. (y) For it will be observed, that the declaration alleges, that the defendant "took certain cattle or goods of the plaintiff, in a

(v) *Morgan v. Ruddock*, 4 Dowl. 311. [And in an action of *indebitatus assumpsit* for goods sold and delivered, a plea that the goods had been seized from the defendant as illegally distilled was held good, since it admitted the sale and delivery from which the law implied a promise but excused non-payment of the price. *Bailey v. Harris*, 12 Q. B. 905.] For further instances of what may be given in evidence under non-assumpsit, see *Shearwood v. Hay*, 5 A. & E. 383. *Elliott v. Thomas*, 3 M. & W. 170. *Buttemere v. Hayes*, 5 M. & W. 456. *Moss v. Smith*, 1 M. & G. 228. *Kemble v. Mills*, *ibid.* 757. *Eastwood v. Kenyon*, 11 A. & E. 438. *Bracey v. Carter*, 12 A. & E. 373. *Filmer v. Burnby*, 2 M. & G. 529; 9 Dowl. 466, S. C. For what may not be given in evidence under non-assumpsit, see *Hill v. Sydney*, 7 A. & E. 956. *Lane v. Glenny*, *ibid.* 83. *Hemming v. Treneny*, 9 A. & E. 926. *Filmer v. Burnby*, 2 M. & G. 529; 9 Dowl. 466, S. C. *Alexander v. Strong*, 9 M. & W. 733.

(y) 1 Chitty, 490; 3 Chitty, 948, 6th edit.

certain place called," &c. (z), and the plea states, that he did not take the said cattle or goods "in manner and form as alleged;" which involves a denial both of the taking and of the place in which the taking was *alleged to have been — the *place* being a [*189] material point in this action. But this plea applies to no other defence.

On the subject of the general issues, it remains only to remark, that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and when resort is had to the latter kind, the party is said to plead *specially*, in opposition to pleading the *general issue*. (a) So the *issues* produced upon special pleas, as being usually more specific and particular than those of *not guilty*, &c., are sometimes described in the books as *special issues*, by way of distinction from the others, which were called *general issues*; (b) the latter term having been afterwards applied, not only to the issues themselves, but to the pleas which tendered and produced them. (c)

(z) *Suprà*, * p. 48.

(a) These terms, it may be remarked, have given rise to the popular denomination of the whole science to which this work relates; which though properly described as that of *pleading*, is generally known by the name of *special pleading*.

(b) Co. Litt. 128 a.; Heath's *Maxims*, 53; Com. Dig. *Pleader* (R. 2).

(c) It is to be observed that by various statutable enactments (see particularly 21 Jac. I., c. 12, s. 5,) made for the protection of magistrates and officers of justice, persons of that description (or their assistants), if sued for acts done in the execution of their office, are in many cases empowered to plead the general issue, and give any special matter of defence in evidence. These provisions are exempted from the operation of the New Rules, by 3 & 4 Will. IV., c. 42, s. 1. In such cases, therefore, this comprehensive effect still belongs to the general issue. See as to such cases, *Neal v. Mackenzie*, 4 Tyrw. 670. *Wells v. Ody*, 5 Tyrw. 725. *Haine v. Davey*, 4 Ad. & Ell. 892. Reg. Gen. T. T. 1 Vict. See 5 & 6 Vict. c. 97, s. 3, repealing all such enactments in the case of local and personal Acts.

[*190] * There is another species of traverse, which varies from the common form, and which, though confined to particular actions, and to a particular stage of the pleading, is of frequent occurrence. It is the traverse *de injuriâ suâ propriâ absque tali causâ*; or (as it is more compendiously called) the traverse *de injuriâ*. It always *tenders issue*; but, on the other hand, differs (like many of the general issues) from the common form of a traverse, by denying in general and summary terms, and not in the words of the allegation traversed. The following is an example: —

PLEA.

Of son assault demesne.

In trespass for assault and battery.

And for a further plea in this behalf, the defendant says, that the plaintiff, just before the said time, when, &c. to wit, on the day and year aforesaid, with force and arms, made an assault upon him, the defendant, and would then have beaten and ill-treated him, the defendant, if he had not immediately defended himself against the plaintiff, wherefore the defendant did then defend himself against the plaintiff, as he lawfully might, for the cause aforesaid; and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the plaintiff: doing no unnecessary damage to the plaintiff on the occasion aforesaid. And so the defendant saith, that if any hurt or damage then happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff on him the defendant, and in the necessary defence of himself the defendant against the plaintiff; which are the supposed trespasses in [*191] the introductory part of this * plea mentioned, and whereof the plaintiff hath above complained. And this the defendant is ready to verify.

REPLICATION.

And as to the said plea by the defendant last above pleaded, the plaintiff says, that the defendant at the said time when, &c., of his

own wrong, and without the cause in his said last-mentioned plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiff hath above complained; and this he prays may be inquired of by the country. (*d*)

This species of traverse occurs in the replication in actions of Trespass, (*e*) Trespass on the case, (*f*) (including the species of assumpsit) (*g*) [also in actions of debt (*gg*) and covenant, (*ggg*)] and in the plea in bar in Replevin; (*h*) but is not used in any other stage of the pleading. In these actions, it is the proper form when the pleading to which it is an answer consists merely of matter of *excuse* of the alleged Trespass, (*i*) grievance, (*k*) *breach of contract, (*l*) or other [*192] cause of action. But if the pleading to be answered, consists of or comprises matter of title, (*m*) or interest in the land, (*n*) &c., — the commandment of the

(*d*) 3 Chitty, 976, 1127, 6th edit.

(*e*) Crogate's case, 8 Rep. 67 a.

(*f*) O'Brien v. Saxon, 2 B. & C. 908.

(*g*) Watson v. Wilks, 5 A. & E. 237. Reynolds v. Blackburn, 7 A. & E. 161. Isaac v. Farrer, 1 M. & W. 65. Griffin v. Yates, 2 Bing. N. C. 579. Basan v. Arnold, 6 M. & W. 559; 8 Dowl. 356, S. C. Humphreys v. O'Connell, 7 M. & W. 370; 9 Dowl. 213, S. C. Whitehead v. Walker, 9 M. & W. 506. Scott v. Chappelow, 2 Dowl. N. S. 78. [Herbert v. Sayer, 5 Q. B. 965. Laforest v. Wall, 9 Q. B. 599. Robinson v. Little, 9 Q. B. 602. Spotswood v. Barrow, 5 Ex. 110.]

[(*gg*) Cowper v. Garbett, 13 M. & W. 33.]

[(*ggg*) Washbourn v. Burrowes, 1 Ex. 107.]

(*h*) Selby v. Bardons, 3 B. & Ad. 2; S. C. in error, 9 Bing.; 1 C. & M. 500. It was formerly supposed not to be admissible in replevin. See Finch Law, 398. Jones v. Kitchen, 1 Bos. & Pul. 76.

(*i*) Crogate's case, 8 Rep. 67 a.

(*k*) O'Brien v. Saxon, 2 B. & C. 908.

(*l*) See the cases cited, *supra*, n. (*g*.)

(*m*) Unless it be mere matter of inducement, Vivian v. Jenkin, 8 A. & E. 741. See also Bowler v. Nicholson, 12 A. & E. 341; 4 P. & D. 16, S. C.

(*n*) Crogate's case, 8 Rep. 67, a. Hooker v. Nye, 1 C., M. & R. 258,

plaintiff, — or authority derived from him, (*q*) — matter of record, (*r*) — of discharge — satisfaction — or release (*s*), — in any of these cases, the traverse de injuriâ is generally improper; (*t*) and the denial of any of these matters should be in the common form; that is, in the words of the allegation traversed. (*u*)

Even in cases where the replication de injuriâ [*193] * is admissible, we may remark, that its adoption is not compulsory; the pleader having his election to traverse in the common form. (*v*) It also deserves notice, that in cases where this replication has been improperly adopted, instead of an ordinary tra-

per cur. in *Bardons v. Selby*, 1 C. & M. 500. *White v. Stubbs*, 2 Saund. 294. *Cooper v. Monke*, Willes, 52; *Cockerill v. Armstrong*, ibid. 99. [*Edmunds v. Pinniger*, 7 Q. B. 558. *Worsley v. South Devon Railway Company*, 16 Q. B. 539. It seems that an interest in or title to chattels, also, may not be put in issue by this replication. See *Selby v. Bardons*, 3 B. & Ad. 2. *Bowler v. Nicholson*, 12 A. & E. 341.]

(*q*) *Solly v. Neish*, 2 C., M. & R. 355. *Purchell v. Salter*, 1 Q. B. 197; 1 G. & D. 682, S. C. Per cur. *Bardons v. Selby*, 1 C. & M. 509. [*Milner v. Jordan*, 8 Q. B. 615.]

(*r*) 8 Rep. 67 a.

(*s*) *Crisp v. Griffiths*, 2 C., M. & R. 159; 3 Dowl. 752, S. C. *Jones v. Senior*, 4 M. & W. 123. [*Hartley v. Manton*, 5 Q. B. 247. *Barns v. Price*, 1 C. B. 214. *Catterall v. Lees*, 8 C. B. 113. *Reid v. Allen*, 4 Ex. 326. *Moss v. Hall*, 5 Ex. 46.]

(*t*) On the subject of *de injuriâ* consult generally *Crogate's case*, 8 Rep. 67 a.; Doct. Pl. 113, 115; 2 Saund. 295, n. (1). *Cockerill v. Armstrong*, Willes, 99. *Selby v. Bardons*, 3 Barn. & Ald. 2. It is said in *Crogate's case*, that this replication is also bad where the plea is founded on "authority given by the law;" but the sense in which this is to be understood seems to be questionable. See *Bowler v. Nicholson*, 12 A. & E. 341; 4 P. & D. 16, S. C. [*Worsley v. South Devon Railway Co.* 16 Q. B. 539. *De injuriâ* is a proper replication to a plea justifying under a custom. *Mortimer v. Moore*, 8 Q. B. 294. Or to a plea setting up illegality. *Scott v. Chappelow*, 4 M. & G. 386. *Mortimer v. Gell*, 4 C. B. 543. *Bennett v. Bull*, 1 Ex. 593. But see *Simons v. Lloyd*, 7 Q. B. 402.]

(*u*) As to the traverse *de injuriâ absque residuo causæ*, see post, Sect. III. Rule 1, 5.

(*v*) *Garten v. Robinson*, 2 Dowl. N. S. 41.

verse, the objection must be taken by way of special, and not of general demurrer. (*w*)

There is still another species of traverse, which differs from the common form, and which will require distinct notice. It is known by the denomination of a *special traverse*. (*x*) Though formerly in very frequent occurrence, this species has now fallen, in great measure, into disuse; but the subtlety of its texture, its tendency to illustrate the general spirit and character of pleading, and the total dearth of explanation in all the reports and treatises with respect to its principle, seem to justify the consideration of it at greater length, and in a more elaborate manner, than its actual importance in practice demands. Of the special traverse the following is an example: —

* *Example 1.*

[*194]

DECLARATION.

In Covenant for Nonpayment of Rent; by the Heir of a Lessor against a Lessee.

A. B. (the plaintiff in this suit, son and heir of *E. B.*, his late father, deceased,) by *G. H.* his attorney, complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff in an action of covenant. For that whereas the said *E. B.* at the time of making the indenture hereinafter mentioned was seised in his demesne as of fee of and in the premises hereafter mentioned to be demised to the defendant. And being so seised, he, the said *E. B.* in his lifetime, to wit, on the ——— day of ———, in the year of our Lord ———, by a certain indenture then made between the said *E. B.* of the one part, and the defendant of the other part, (one part of which said indenture, sealed with the

(*w*) *Parker v. Riley*, 3 M. & W. 230; 6 Dowl. 375, S. C. *Curtis v. Marquis of Headfort*, 6 Dowl. 496. It was formerly held otherwise, see *Fursdon v. Weeks*, 3 Lev. 65. *Hooker v. Nye*, 1 C., M. & R. 258.

(*x*) It is called a *formal traverse*; or a *traverse with an absque hoc*.

seal of the defendant, the plaintiff now brings here into court, the date whereof is the day and year aforesaid,) for the considerations therein mentioned, did demise, lease, set, and to farm let, unto the defendant, his executors, administrators and assigns, a certain messuage or dwelling-house, with the appurtenances, situate at ———, to have and to hold the same unto the defendant, his executors, administrators and assigns, from the ——— day of ——— then last past, to the full end and term of ——— years thence next ensuing and fully to be complete and ended, yielding and paying therefor yearly, and every year, to the said *E. B.*, his heirs or assigns, the clear yearly rent or sum of ——— pounds, payable quarterly, at the four most usual feasts, or days of payment of rent, in the year, that is to say, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of [*195] December, in each and *every year, in equal portions.

And the defendant did thereby for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said *E. B.*, his heirs and assigns, that he, the defendant, his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said *E. B.*, his heirs or assigns, the said yearly rent or sum of ——— pounds, at the several days and times aforesaid; as by the said indenture, reference being thereunto had, will more fully appear. By virtue of which said demise, the defendant afterwards, to wit, on the ——— day of ———, in the year ———, entered into the said premises, and was thereof possessed for the said term, the reversion thereof belonging to the said *E. B.* and his heirs. And the defendant, being so possessed, and the said *E. B.* being so seised of the said reversion in his demesne as of fee, he, the said *E. B.* afterwards, to wit, on the ——— day of ———, in the year aforesaid, died so seised of the said reversion. After whose decease the said reversion descended to the plaintiff, as son and heir of the said *E. B.*; whereby the plaintiff was seised of the reversion of the said demised premises in his demesne as of fee. And the plaintiff in fact says, that he, the plaintiff, being so seised, and the defendant being so possessed as aforesaid, afterwards, and during the said term, to wit, on the ——— day of ———, in the year of our Lord ———, a large sum of money, to wit, the sum of ——— pounds of the rent aforesaid, for divers, to wit, ——— years of the said term, then elapsed, became and was due and owing, and still is in arrear and unpaid to the plaintiff, contrary to the form and effect of the said covenant in

that behalf. And so the plaintiff in fact saith, that the defendant (although often requested) hath not kept his said covenant in that behalf, but hath broken the same, and to keep the same hath hitherto wholly refused and still refuses; to the damage of the plaintiff of ——— pounds; and, therefore, he brings his suit, &c.

* PLEA.

[*198]

And the defendant, by ———, his attorney, says, that the said *E. B.* deceased, at the time of the making of the said indenture, was seised in his demesne, as of freehold for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seised thereof until and at the time of his death; and that after the making of the said indenture, and before the expiration of the said term, to wit, on the ——— day of ———, in the year of our Lord ———, the said *E. B.* died; whereupon the term created by the said indenture wholly ceased and determined; *Without this, that*, after the making of the said indenture, the reversion of the said demised premises belonged to the said *E. B.* and his heirs, in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country. (a)

The substance of this plea is, that the father was seised for life only, and therefore that the term determined at his death; which involves a denial of the allegation in the declaration, that the reversion belonged to the father in fee. The defendant's course was, therefore, to traverse the declaration.(b) But it will be observed that he *does not traverse it in the [*197] common form. If the *common* traverse were

(a) 3 Chitty, 908, 6th edit.; and see *Brudnell v. Roberts*, 2 Wils. 143. *Palmer v. Ekins*, *Ld. Raym.* 1550.

(b) Where the plaintiff alleges a seisin in fee in his father, the lessor, from whom he claims by descent, — the defendant has the option of traversing either, that, at the time of making the lease, the father was seised in fee, — or that the reversion in fee belonged to the father after making the lease, — or, that the reversion descended to the plaintiff; — for all these allegations are contained in the declaration, and the denial of any of them is a sufficient answer. *Brudnell v. Roberts*, 2 Wils. 143.

adopted in this case, the plea would be — “The defendant by ——— his attorney, says, that after the making of the said indenture, the said reversion of the said demised premises did not belong to the said *E. B.* and his heirs, in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country.” But instead of this simple denial, the defendant adopts a *special* traverse. This first sets forth the new affirmative matter, that *E. B.* was seised for life, &c. ; — and then annexes to this the denial that the reversion belonged to him and his heirs, by that peculiar and barbarous formula, *Without this, that, &c.*, concluding to the country. The affirmative part of the special traverse is called its *inducement* ;(c) the negative part is called the *absque hoc*, (d) — those being the Latin words formerly used, and from which the modern expression *without this*, is translated. The different parts and properties here noticed are all essential to a special traverse ; which must always thus consist of an inducement, a denial, and a conclusion to the country.(e)

[*198] * By way of further illustration, and as the foundation of some subsequent remarks on the nature and meaning of a special traverse, it will be necessary here to add some other examples of this form of pleading.

(c) Bac. Ab. Pleas, &c. (H. 1).

(d) The denial, however, may be introduced by other forms of expression besides *absque hoc*. *Et non* will suffice. *Bennet v. Filkins*, 1 Saund. 21. *Walters v. Hodges*, Lut. 1625.

(e) The conclusion was formerly always with a verification, but must now be to the country by Rule Hil. Term, 4 Will. IV. vide post, *p. 210.

Example 2.

PLEA.

In Trespass quare clausum fregit.

And for a further plea, as to the breaking and entering the said close, in which, &c. and the treading down, trampling upon, consuming, and spoiling, the said grass and herbage, as above supposed to have been done, the defendant says, that before the said time when, &c. to wit, on the ——— day of ———, in the year ———, one *I. N.*, clerk, prebendary of the prebend of *N.* in the cathedral church of *H.* was seised in his demesne as of fee, in right of the said prebend, of and in certain tenements, whereof the said close in which, &c., then and from thenceforth hitherto hath been parcel. And being so seised, before the said time when, &c., to wit, on the day and year last aforesaid, by a certain indenture, sealed with the seal of the said *I. N.* (and now shown to the court here, the date whereof is the day and year last aforesaid), the said *I. N.* demised the said tenements, with the appurtenances, (among other things,) to the defendant, by the name of all his prebend of *N.* aforesaid, &c., to have and to hold to the defendant and his assigns from the ——— day of ——— then next, to the end and term of fifty years thence next following, yielding and paying therefore yearly, during the said term, to the said prebendary and his successors, the sum of ——— pounds, at the feasts of ——— and ——— by equal portions. By virtue of * which demise the defendant was pos- [* 199] sessed (among other things) of the said tenements, with the appurtenances. And being so possessed, one *I. H.*, bishop of ———, then being true and undoubted patron and ordinary of the said prebend of *N.*, afterwards, to wit, on the ——— day of ———, in the year ———, by his writing, sealed with his common seal (and now shown to the court here, the date whereof is the day and year last aforesaid), ratified, approved, and confirmed the said estate and interest of the defendant in the premises. And afterwards one *I. E.*, master of arts, dean of the said cathedral church, and the dean and chapter of the said church for the time being, (*f*) to wit, on the ——— day of ———, in the year ———, by their writing, sealed with their

(*f*) If the bishop happen to be patron as well as ordinary, the confirmation of the dean and chapter, as well as the bishop, is necessary, Co. Litt. 300 b.

common seal (and now shown to the court here, the date whereof is the day and year last aforesaid), ratified, approved, and confirmed the said estate and interest of the defendant in the premises. And the plaintiff, claiming the said tenements, with the appurtenances, by colour of a certain charter of demise to him thereof made for the term of his life by the said *I. N.* long before the said demise to the defendant, in form aforesaid made (whereas nothing of the said tenements, with the appurtenances, ever passed into the possession of the plaintiff by that charter), before the said time when, &c. entered into the said tenements, with the appurtenances; upon whose possession whereof the defendant, at the said time when, &c. entered into the said tenements, with the appurtenances, and broke and entered the said close in which, &c., and trod down, trampled upon, consumed, and spoiled, the grass and herbage there growing and being, as it was lawful for him to do, for the cause aforesaid; which are the same trespasses in the introductory [*200] part of this plea mentioned, and whereof the plaintiff *hath above complained. And this the defendant is ready to verify.

REPLICATION.

And the plaintiff says that the defendant, on the said — day of —, in the year —, brought to the said bishop a certain writing of demise of the said tenements by the said *I. N.* to the defendant and then desired the said bishop to confirm the said writing, sealed with the seal of the said *I. N.*; in which writing no number of years was then written, which the defendant was to have in the said tenements; which said writing of demise the said bishop then confirmed, and sealed the said writing with his seal. And before the said time, when, &c., to wit, on the — day of —, in the year —, the said *I. N.* died. After whose death, and before the said time, when, &c., the said bishop, as the true and undoubted patron and ordinary of the said prebend so being vacant by the death of the said *I. N.*, collated the same on his clerk, the plaintiff, and caused him to be justly instituted and inducted, and put in corporal possession of the said prebend. Whereby the plaintiff was seised of the said tenements, with the appurtenances, in his demesne as of fee, in right of his said prebend, until the defendant, on the — day of —, in the year —, with force and arms broke and entered the close of the plaintiff at — aforesaid,

and trod down, trampled upon, consumed and spoiled, the grass and herbage therein, to the value of —— pounds, as he hath above complained. *Without this, that* the said bishop, by his said writing, ratified, approved and confirmed the estate and interest of the defendant in the premises, in manner and form as the defendant hath in his said last-mentioned plea alleged. And this the plaintiff prays may be inquired of by the country.(g)

*In both the preceding examples it will be [*201] observed that the inducement contains new affirmative matter. But a special traverse may also occur in cases where the denial is, in its nature, unconnected with any new affirmative matter that can be stated by way of inducement. Of this the following is an example: —

Example 3.

PLEA.

In trespass for Assault and Battery.

And for a further plea in this behalf, as to the said assaulting in the declaration mentioned, the defendant says, that before the said time, when, &c., to wit, on the —— day of ——, at ——, in the county of ——, before *E. F.*, then one of the justices of our Lady the Queen, assigned to keep the peace in the said county of ——, came the defendant and duly made oath on the Holy Gospels that he, the defendant, was in grievous fear that damage and bodily injury would be done to him by the plaintiff, and then and there prayed that the said *E. F.* would compel the plaintiff to find sufficient security of the peace towards the defendant, and all other the subjects of our said Lady the Queen, in due form of law. By reason whereof the said *E. F.* directed and delivered his certain warrant under his seal to the constables and bailiffs of the hundred of *M.*, and also to one *X.* and one *Y.*, and thereby ordered them jointly and severally that they, or one of them, should cause the plaintiff to come before him, the said *E. F.*, or some other justice of our Lady the Queen assigned to keep the peace in the said

(g) See the precedent, Pl. Gen. 609.

county, without delay, in order to find sufficient security of [*202] the peace *in form aforesaid. And that if the plaintiff should refuse so to do, then that they, or one of them, should, by virtue of the said warrant, take, or cause to be taken, the plaintiff to the gaol of our Lady the Queen, of ———, in the county aforesaid, there to remain until he should find the said security as required by law in that behalf. By reason whereof the said X. having in his possession the said warrant, on the said day, when, &c., and before the said assault, gave notice to the plaintiff of the said warrant and of the contents and effect thereof, and then and there required the plaintiff, by virtue of the said warrant, to come together with him, the said X., before the said *E. F.* or some other justice of our Lady the Queen, assigned to keep the peace for the said county, in order to find sufficient security of the peace in form aforesaid, which the plaintiff then and there refused to do. Whereupon the said X. would then and there have taken and arrested him the plaintiff; but the plaintiff would not submit to the said arrest, but with force and violence resisted the same. And thereupon the said X. and the defendant, as his servant and by his command, at the said time when, &c., laid their hands upon the plaintiff in order to take and arrest, and then and there took and arrested him as it was lawful for them to do for the cause aforesaid. Which is the same trespass in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained. And this the defendant is ready to verify

REPLICATION.

And the plaintiff says, that the defendant, of his own wrong made an assault upon him the plaintiff, and beat, wounded, and ill-treated him in manner and form as he hath above complained. *Without this, that* before the said assault, the said X. gave notice to the plaintiff of the said warrant, or of the contents and [*203] effect thereof, as the *defendant hath above alleged. And this the plaintiff prays may be inquired of by the country. (*h*)

In this last example, it will be observed that there is *no* new affirmative matter contained in the inducement. For it consists of a mere repetition of the trespasses that

(*h*) See the precedent, *Rast.* 669.

had been antecedently alleged in the declaration, and an allegation that they were committed de injuriâ suâ propriâ, or of the defendant's own wrong. In this respect, therefore, viz. in the want of new affirmative matter in the inducement, this last example differs from the two first given.

The *use and object* of a special traverse is the next subject for consideration. Though this relic of the subtle genius of the ancient pleaders has now fallen (as above stated) into comparative disuse, it is still of occasional occurrence; (i) and it is remarkable, therefore, that no author should have hitherto offered any explanation of the objects for which it was originally devised, and, in a view to which, it continues to be, in some cases, adopted. (k) * The following re- [*204] marks are submitted, as those which have occurred to the writer of this work, on a subject thus barren of better authority. The general design of a special traverse, as distinguished from a common one, is to *explain or qualify the denial*, instead of putting it in the direct and absolute form; and there were several different views, in reference to one or other of which, the ancient pleaders seem to have been induced to adopt this course.

First. A simple or positive denial may, in some

(i) See examples, *Brogden v. Marriott*, 2 Bing. N. C. 473. *Cross Key Company v. Rawlings*, 3 Bing. N. C. 71. *Earl of Harrington v. Bishop of Lichfield*, 4 Bing. N. C. 77. *Craven v. Sanderson*, 4 A. & E. 666. *King v. Bowen*, 8 M. & W. 625; 1 Dowl. N. S. 21, S. C. *Fraser v. Welch*, 8 M. & W. 629; 9 Dowl. 754, S. C.; *Cole v. Cresswell*, 11 A. & E. 661. *Beckham v. Knight*, 1 M. & G. 738. *Wilson v. Craven*, 8 M. & W. 584.

(k) Mr. Reeves, in his able *History of the English Law*, has treated *of the origin of special traverses, — but not in such a [*204] manner as to form any exception to the remark made in the text; for his account relates rather to the manner in which they were invented and introduced, than to their use and object. 3 Reeves, 432.

cases, be rendered improper, by its opposition to some general rule of law. Thus, in the example of special traverse first above given, it would be improper to traverse in the common form; viz. "that after the making of the said indenture, the reversion of the said demised premises did not belong to the said *E. B.* and his heirs," &c.; because by a rule of law, a tenant is precluded, (or, in the language of pleading, *estopped*,) from alleging that his lessor had no title in the premises demised; (1) and a general assertion that the reversion did not belong to

him and his heirs, would seem to fall within the [*205] prohibition of that rule. * But a tenant is not by law estopped to say that his lessor had only a *particular estate*, which has since expired. (m) In a case, therefore, in which the declaration alleged a seisin in fee in the lessor, and the nature of the defence was, that he had a particular estate only (e. g. an estate for life), since expired, the pleader would resort, as in the first example, to a special traverse — setting forth the lessor's limited title by way of inducement, and traversing his seisin of the reversion in fee under the *absque hoc*. He thus would avoid the objection that might otherwise arise on the ground of estoppel.

Secondly. A common traverse may sometimes be inexpedient, as involving in the issue in *fact* some question which it would be desirable rather to develop, and submit to the judgment of the court, as an issue in *law*. This may be illustrated by the second example of special traverse above given. In that case, it would seem that a lease not expressing any certain term of demise, had been brought to the ordinary for his confirmation; that he had accordingly confirmed it in that shape under his

(1) *Blake v. Foster*, 8 T. R. 487.

(m) *Ibid*.

seal; and that the instrument was afterwards filled up as a lease for fifty years. The party relying upon this lease states that the demise was to the defendant for the term of fifty years — and *that [* 206] the ordinary, “ratified, approved, and confirmed, his estate and interest in the premises.” (n) If the opposite party were to traverse in the common form — “that the ordinary did not ratify, approve and confirm his estate and interest in the premises, &c.” and so tender issue in fact on that point, it is plain that there would be involved in such issue the following question of *law*; viz. whether the confirmation by the ordinary of a lease in which the length of the term is not, at the time, expressed, be valid? This question would, therefore, fall under the decision of the jury, to whom the issue in fact is referred; subject to the direction of the judge presiding at nisi prius, and the ultimate revision of the court in bank. Now it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance; and that for that purpose an issue in *law* should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement — substituting a special for a common traverse. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was, under the circumstances, valid in point of law, he is enabled *by this plan of [* 207] special traverse to raise the point by demurring

(n) This case would seem to have arisen before the restraining statutes: after which, a lease by ecclesiastical persons, even with confirmation, was good for no longer period than twenty-one years or three lives. 2 Bl. Com. 320.

to the replication ; on which demurrer an issue in law arises for the adjudication of the court.

By these reasons, and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial. (*o*) But though these reasons seem to show the purpose of the *inducement*, they do not account for the other distinctive feature of the special traverse — viz. the *absque hoc*. For it will naturally suggest itself, that the affirmative matter might, in each of the above cases, have been pleaded *per se*, without the addition of the *absque hoc*. This latter form was dictated by another principle. The direct denial under the *absque hoc* was rendered necessary by this consideration — that the affirmative matter, taken *alone*, would be only an *indirect* (or, as it is called in pleading, *argumentative*) denial of the precedent statement ; and by a rule which will be considered in its proper place hereafter, all *argumentative* pleading is prohibited. In order, therefore, to avoid this fault [*208] of *argumentativeness*, * the course adopted was, to follow up the explanatory matter of the inducement with a *direct* denial. (*p*) Thus to allege, as in the first example, that *E. B.* was seised for life would be to deny by implication, but by implication *only*, that the reversion belonged to him in fee ; and therefore, to avoid argumentativeness, a direct denial that the rever-

(*o*) See Appendix, NOTE 38.

(*p*) 3 Reeves' Hist. 432 ; Bac. Ab. Pleas, &c. (H.). Courtney v. Phelps, 1 Sid. 801. Herring v. Blacklow, Cro. Eliz. 30; 10 Hen. 6, 7, pl. 21.

sion belonged to him in fee is added under the formula of *absque hoc*. (q)

The special traverse having, with these views and in this manner, been introduced into the system of pleading, grew so much into fashion, as to be frequently adopted even in cases to which the original reasons of the form were inapplicable — that is, to cases where the intended denial was in its nature simple and absolute, and connected with no new matter. This will be illustrated by the last of the preceding examples. In this, the defendant having pleaded a warrant of arrest, of which he alleged the officer to have given notice to the plaintiff, the object of the replication is merely to deny that such notice was given : and there is no reason why this should not be done in the simple form of a common traverse — viz. “that before the said assault the said X. did not give notice to the plaintiff of the said warrant, or of * the contents and effect thereof [*209] in manner and form as alleged.” But the fashion of traversing specially, led the ancient pleaders, in such a case as this also, to use the inducement and the *absque hoc* ; and because the nature of the case afforded no allegation of new matter, as introductory to the denial, — in lieu of this, a kind of inducement was adopted, containing, in fact, no new matter, but a mere repetition of the original complaint — viz. “that the defendant, *of his own wrong, made an assault, &c.* Without this, that, &c. (r)

Having now explained the form, the effect, and the use and object of a special traverse, it remains to show

(q) See Appendix, NOTE (39).

(r) Upon the same principle, where the traverse was taken in the rejoinder, it had often an inducement simply maintaining the matter of the plea, as in *Stennel v. Hogg*, 1 Saund. 223. *Mayor of Orford v. Richardson*, 4 T. R. 437; 9 Went. 211, 308.

in what cases this method of pleading is or ought to be applied at the present day. First, it is to be observed, that this form was at *no* period applicable to *every case* of denial, at the pleasure of the pleader. There are many cases of denial, to which the plan of special traverse has never been applied; and which have always been and still are the subjects of traverse in the common form exclusively. (s) These it is not easy to enumerate or define: they are determined by the course of [*210] precedent, and in that way become * known to the practitioner. On the other hand, in many cases where the special traverse used anciently to occur, it is now no longer practised. This relates principally to that species of it, which is illustrated by the last example. Even when the formula was most in repute, the use of *this* species was occasional only; for in cases which admit or require no allegation of new matter, we find the special and the common traverse to have been indifferently used by the pleaders of those days. (t) But in modern times, the special traverse, without an inducement of new matter, has been almost entirely superseded by the common traverse. The *conclusion to the country* in a special traverse, is a novelty, introduced by the recent Rule of court, Hil. 4 Wil. IV., and until then, the conclusion had always been with a *verification*; the effect of which of course was to postpone the issue to one stage of the pleading later than it would have been obtained by a traverse in the common form. (u) The special traverse was for this reason considered as a dilatory method; and as the taste in pleading gradually im-

(s) *Horne v. Lewin*, 1 Ld. Raym. 641.

(t) *Rast. Ent.* 622; and see *Horne v. Lewin*, 1 Ld. Raym. 641.

(u) This substitution of a conclusion to the country for a verification, in a special traverse, was recommended by the Common Law Commissioners, Second Report, p. 34.

proved, it was consequently viewed with disfavour by the courts; and they began not only to enforce the doctrine that the common form * might allow- [*211] ably be substituted in cases where there was no inducement of new matter, but often intimated their preference of that form to the other. (*v*) With respect to the other kind of special traverse, viz. that which is attended with an inducement of new matter, it was originally devised, as has been shown, for certain reasons of convenience or necessity; and those reasons must still occasionally operate the same way. There is felt however in modern practice a great disinclination to adopt in any case whatever, without a clear reason for doing so this old-fashioned form; and notwithstanding the late improvement, by which a tender of issue is substituted for a verification, that feeling is likely to remain unaltered. For a special traverse is still open to the objection of prolixity, and is attended besides with this additional inconvenience, that the inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the denial proceeds; and thus facilitates to the latter the preparation of his proofs, or otherwise guides him in his further proceedings. But where allowable, it should still be occasionally adopted, in a view to the various grounds of necessity or convenience by which it was originally suggested. Accordingly, it is apprehended, that in the two first examples, a special traverse would be as * proper at the present day [*212] as it was at the period when the precedents first occurred.

To complete our view of the nature of a special

(*v*) Robinson *v.* Rayley, 1 Burr. 320.

traverse, it will be necessary now to advert to certain principles laid down in the books relative to this form.

First, it is a rule, *that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading.*(w) For (as has been shown) it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had previously been made in an indirect one. Now an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the *absque hoc*, an answer, in substance, to the last pleading. Thus, in the first example, the allegation that *E. B.* was seised for life, and that that estate is since determined, is in itself, in substance, a sufficient [*213] answer, as denying by *implication that the fee descended from *E. B.* on the plaintiff. That sort of special traverse containing no new matter in the inducement, as in the last example, is no exception to this rule. Thus, to say, as in that example, that the defendant, *of his own wrong* made an assault, &c., is of itself an answer; for it indirectly denies that notice was given of the warrant.

It follows from the same consideration, as to the object and use of a special traverse, that the answer given by the inducement can properly be of *no other* nature than that of an indirect denial. Accordingly we find it decided, in the first place, *that it must not consist of a direct denial.* Thus, the plaintiff, being bound by recog-

(w) Bao. Ab. (H. 1); Com. Dig. Pleader (G. 20); Anon. 3 Salk. 353. Dike v. Ricks, Cro. Car. 336. Matthews v. Taylor, 2 M. & G. 667.

nisance to pay J. Bush £300 in six years, by £50 per annum, at a certain place, alleged that he was ready every day at that place to have paid to Bush the said £50, but that Bush was not there to receive it. To this the defendant pleaded, that J. Bush was ready at the place to receive the £50, *absque hoc* that the plaintiff was there ready to have paid it. The plaintiff demurred, on the ground that the inducement of this traverse alleging Bush to have been at the place ready to receive, contained a direct denial of the plaintiff's precedent allegation that Bush was *not* there, and should therefore have concluded to the country without the *absque hoc*; and judgment was given accordingly for the * plaintiff.(x) Again, as the an- [*214] swer given by the inducement must not be a *direct denial*, so it must not be *in the nature of a confession and avoidance*.(y) Thus, if the defendant makes title as assignee of a term of years of A., and the plaintiff, in answer to this, claims under a prior assignment to himself from A. of the same term, this is a confession and avoidance; for it admits the assignment to the defendant, but avoids its effect, by showing the prior assignment. Therefore, if the plaintiff pleads such assignment to himself by way of inducement, adding, under an *absque hoc*, a denial that A. assigned to the defendant, this special traverse is bad.(z) The plaintiff should have pleaded the assignment to himself, as in confession and avoidance, without the traverse.

Again, it is a rule with respect to special traverses, that the opposite party has no right to traverse the

(x) *Hughes v. Phillips*, Yelv. 38; and see 36 Hen. VI. 15.

(y) Com. Dig. Pleader, (G. 3). *Lambert v. Cook*, *Ld. Raym.* 288. *Helier v. Whytier*, Cro. Eliz. 650. *Pearson v. Rogers*, 9 A. & E. 308.

(z) Com. Dig. Pleader, (G. 3). *Helier v. Whytier*, Cro. Eliz. 650.

inducement,(a) or (as the rule is more commonly expressed) *that there must be no traverse upon a* [*215] *traverse.*(b) Thus, in the first *example, *p. 196, if the replication, instead of taking issue on the traverse, (as it ought to do,) were to traverse the inducement, either in the common or the special form, denying that *E. B.* at the time of making the indenture was seised in his demesne as of freehold, for the term of his natural life, &c., such replication would be bad, as containing a traverse upon a traverse. The reason of this rule is clear and satisfactory. By the first traverse, a matter is denied by one of the parties, which had been alleged by the other, and which, having once alleged it, the latter is bound to maintain, instead of prolonging the series of the pleading and retarding the issue, by resorting to a new traverse. However, this rule is open to an important exception, viz. *that there may be a traverse upon a traverse, when the first is a bad one* ;(c) or (in other words) if the denial under the absque hoc of the first traverse be insufficient in law, it may be passed by, and a new traverse taken on the inducement. Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common council of the city of London ; but that the defendants delivered [*216] *a petition to the court of common council, complaining of an undue election, and suggesting

(a) Anon. 3 Salk. 353. *Earl of Harrington v. Bishop of Lichfield*, 4 Bing. N. C. 77.

(b) Com. Dig. Pleader, (G. 17). Bac. Ab. Pleas, &c. (H. 4). *The King v. Bishop of Worcester*, Vaughan, 62. *Digby v. Fitzharbert*, [*215] *Hob. 104. *Hernbro v. Bailey*, 1 C. & M. 404. *Cardwardine v. Watkins*, 7 Dowl. 484.

(c) Com. Dig. Pleader, (G. 18, 19). *Thrale v. Bishop of London*, 1 H. Bla. 376. *Richardson v. Mayor of Orford*, 2 H. Bla. 186. *King qui tam v. Bolton*, Stra. 117. *Cross v. Hunt*, Carth. 99. And see the late Rule of court, Hil. T., 4 Wil. IV. r. 13.

that they themselves were chosen ; whereas (the plaintiff alleged) the common council had no jurisdiction to examine the validity of such an election, but the same belonged to the court of the mayor and aldermen. The defendants pleaded that the common council, time out of mind, had authority to determine the election of common councilmen ; and that the defendants being duly elected, the plaintiff intruded himself into the office ; whereupon the defendants delivered their petition to the common council complaining of an undue election ; *without this, that* the jurisdiction to examine the validity of such election belonged to the court of the mayor and aldermen. The plaintiff replied by traversing the inducement ; that is, he pleaded that the common council had not authority to determine the election of common councilmen, concluding to the country. To this the defendant demurred, and the court adjudged that the first traverse was bad ; because the question in this prohibition was not whether the court of aldermen had jurisdiction, but whether the common council had ; and that the first traverse being immaterial, the second was well taken. (*d*)

* As the inducement cannot, when the denial under the *absque hoc* is sufficient in law, be *traversed*, so, for the same reason, it cannot be answered by a *pleading in confession and avoidance*. But, on the other hand, if the denial be bad in law, the opposite party has then a right to plead in confession and avoidance of the inducement, or (according to the nature of the case) to traverse it ; or he may *demur* to the whole traverse, for the fault in the denial. (*e*)

(*d*) King *qui tam v. Bolton*, Stra. 117; and see Reg. Hil. T., 4 Will. IV. r. 13.

(*e*) Com. Dig. Pleader, (G. 22). *Hembrow v. Bailey*, 3 Tyrw. 152.

As the inducement of a special traverse, when the denial under the *absque hoc* is sufficient, can neither be traversed nor confessed and avoided, it follows that there is in that case *no* manner of *pleading* to the inducement. The only way, therefore, of answering a good special traverse is to join issue upon it. But though there can be no *pleading* to an inducement, when the denial under the *absque hoc* is sufficient, yet the inducement may be open in that case to exception in point of *law*. If it be faulty in any respect, as (for example) in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the *absque hoc* be good—for this insufficiency in the inducement.(f)

[*218] * Lastly, we may observe that when issue is joined on a special traverse, the party traversing is in general not bound at the trial, to prove the affirmative part, or inducement, but is entitled (as in ordinary cases) to insist on the negative of the issue joined. Thus, in an action on the case against the owners of a vessel, for carelessly impinging on the plaintiff's bridge, the defendants pleaded, that the plaintiff improperly narrowed the channel over which the bridge was erected, *without this*, that the damage was occasioned by the negligence of the defendants; and though they failed at the trial to establish the obstruction imputed to the plaintiffs, they were held entitled, nevertheless, to insist that the accident was not owing to their own carelessness.(g) On the other

(f) Com. Dig. Pleader, (G. 20). *Foden v. Haines*, Comb. 245.

(g) *Cross Keys Company v. Rawlings*, 3 Bing. N. C. 71; 2 Hodg. 147, S. C.

hand, however, the nature of the issue may be sometimes such as to throw the onus of proof on the party traversing, (*h*) and in such cases it may become incumbent on him to prove the matter of the inducement. (*i*)

The *different kinds of forms of* traverse having been now explained, it will be proper next to advert to certain principles which belong to *traverses in general*.

* The first of these that may be mentioned, [*219] is that it is the nature of a traverse, to deny the matter of fact in the adverse pleading, in the *manner and form* in which it is alleged, (*k*) and, therefore, to put the opposite party to prove it to be true in *manner and form*, as well as in general effect. Accordingly, it has been shown in the first chapter, (*l*) that he is often exposed at the trial to the danger of a *variance*, for a slight deviation in his evidence from his allegation. This doctrine of *variance*, we now perceive to be founded on the strict quality of the traverse here stated. On this subject of variance, or the degree of strictness with which, in different instances, the traverse puts the fact in issue, there are a great number of adjudged cases, involving much nicety of distinction; but it does not belong to this place to enter into it more fully, as it has been already sufficiently discussed in a preceding part of this work. (*m*) The general principle is that which is here stated, that the traverse brings the fact into question, according to the *manner and form in which it is alleged*; and that the opposite party must consequently prove that in substance, at least, the allegation

(*h*) Vide *suprà*, *p. 92, n. (*h*).

(*i*) *Craven v. Sanderson*, 4 Ad. & Ell. 666.

(*k*) See *Marshall v. Whiteside*, 1 Tyr. & G. 485. *Wetherell v. Howard*, 8 Bing. 135.

(*l*) *Suprà*, *p. 93. And see *Hoar v. Mill*, 4 M. & S. 470.

(*m*) *Suprà*, *pp. 93, 94.

is *accurately true*. The existence of this principle is indicated by the *wording* of a *traverse; which, when in the negative, generally denies the last pleading, *modo et formâ*, "in manner and form as alleged." (n) This will be found to be the case in all the preceding examples, except in the general issue *non est factum*, and the replication *de injuriâ*, — which are almost the only negative traverses that are not pleaded *modo et formâ*. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer. (o)

It is naturally a consequence of the principle here mentioned, that great accuracy and precision in adapting the allegation to the true state of the fact, are observed in all well drawn pleadings; the vigilance of the pleader being always directed to these qualities, in order to prevent any risk of *variance* or failure of proof at the trial, in the event of a traverse by the opposite party.

Again, with respect to all traverses, it is laid down as a rule, that *a traverse must not be taken upon* [*221] *matter of law*. (p) For a denial of the law *involved in the preceding pleading, is, in other words, an exception to the sufficiency of that pleading

(n) But notwithstanding the words *modo et formâ*, it is enough to prove the *substance* of the allegation. See Litt. Sec. 483; Doct. Pl. 344. *Harris v. Ferrand*, Hardr. 39. *Pope v. Skinner*, Hob. 72. *Carrick v. Blagrave*, 1 Brod. & Bing. 536; *suprà*, *p. 94.

(o) Com. Dig. Pleader, (G. 1). *Nevil and Cook's case*, 2 Leo. 4.

(p) Plow. Com. 231; 1 Saund. 23, n. (5); Doct. Pl. 351. *Kenicot v. Bogan*, Yelv. 200; *Priddle and Napper's case*, 11 Rep. 10b. *Richardson v. Mayor of Orford*, 2 H. Bl. 182. *Hobson v. Middleton*, [*221] *6 B. & C. 297. *Trower v. Chadwick*, 3 Bing. N. C. 334. *Cane v. Chapman*, 5 A. & E. 647. *Dangerfield v. Thomas*, 9 A. & E. 292. *Summers v. Ball*, 8 M. & W. 596. *Cowan v. Braidwood*, 1 M. & G. 882; 9 Dowl. 26.

in point of law; and is, therefore, within the scope and proper province of a *demurrer*, and not of a *traverse*. Thus, where to an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the locus in quo was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing, and the plaintiff, in his replication, traversed that, in the said arm of the sea, every subject of the realm had the liberty and privilege of free fishing, this was held to be a traverse of a mere inference of *law*, and therefore bad. (*q*) So, where in an action on the case for improperly removing a wall, the plaintiff alleged, that it was the defendant's duty to have taken proper precautions in pulling it down, so as not to injure an adjoining vault of the plaintiff's; and the defendant pleaded by way of traverse, that it was not his duty to have taken any precaution, this plea was considered as open to the same objection. (*r*) Upon the same principle, if a matter be alleged in pleading, "by reason whereof" (*virtute cujus*), a *certain legal inference is [*222] drawn, — as that plaintiff "became seised," &c., or the defendant "became liable," &c., — this *virtute cujus* is not traversable; (*s*) because, if it be intended to question the facts from which the seisin or liability is deduced, the traverse should be applied to the facts, and to those only; and, if the legal inference be doubted, the course is to demur. But, on the other hand, where an allegation is *mixed of law and fact*, it may be traversed. (*t*) For example, in answer

(*q*) *Richardson v. Mayor of Orford*, 2 H. Bl. 182.

(*r*) *Trower v. Chadwick*, 3 Bing. N. C. 334.

(*s*) Doct. Pl. 351; *Priddle and Napper's case*, 11 Rep. 10 b.

(*t*) 1 Saund. 23, n. (5), and see the instances cited. Bac. Ab. Pleas, &c., p. 380, note (*b*), 5th edit. *Beal v. Simpson*, 1 Lord Raym. 412. *Grocers' Company v. Archbishop of Canterbury*, 3 Wils. 234. *Ransford*

to an allegation, that a man was "taken out of prison by virtue of a certain writ of habeas corpus," it may be traversed that he was "taken out of prison by virtue of that writ." (*u*) So, where it was alleged in a plea, that, in consequence of certain circumstances therein set forth, it belonged to the wardens and commonalty of a certain body corporate, to present to a certain church, being vacant, in their turn, being the second turn, — and this was answered by a special traverse, — *without this, that* it belonged to the said wardens and commonalty to present to the said church at [*223] the *second turn, when the same became vacant, &c., in manner and form as alleged, — the court held the traverse good, as not applying to a mere matter of law, "but to a matter of law, or rather of right, resulting from facts." (*v*) Upon the same principle, traverse may be taken upon an allegation that a certain person obtained a certain church by simony. (*w*) And to a plea that certain persons were illegally associated to more than the number of six, as bankers, the plaintiff may well reply that they were not illegally associated modo et formâ as alleged. (*x*)

It is also a rule, *that a traverse must not be taken upon matter not alleged.* (*y*) The meaning of this rule will be

v. Copeland, 1 Nev. & P. 671; 6 A. & E. 482, S. C. *Lucas v. Nockels*, 4 Bing. 729; 10 Bing. 158 (in error). *Hume v. Liversedge*, 1 Crompt. & M. 332. *Avery v. Cheslyn*, 3 Ad. & Ell. 75. *Carnaby v. Welby*, 8 A. & E. 872. *Drewe v. Lainson*, 3 P. & D. 253; 11 A. & E. 528, S. C. *Rutter v. Chapman*, 8 M. & W. 1.

(*u*) *Beal v. Simpson*, 1 Lord Raym. 412; Treby, Ch. J., cont.

(*v*) *Grocers' Company v. Archbishop of Canterbury*, 3 Wils. 234.

(*w*) *Ibid.*; *Rast. Ent.* 532 a.

(*x*) *Ransford v. Copeland*, 1 Nev. & P. 671; 6 A. & E. 482, S. C.

(*y*) 1 Saund. 312 d. n. (4); Doct. Pl. 358. *Crosse v. Hunt*, Carth. 99. *Powers v. Cook*, 1 Lord Raym 63; 1 Salk. 298, S. C. *Trower v. Chadwick*, 3 Bing. N. C. 334. *Bishton v. Evans*, 5 Tyrw. 639; 2 C., M. & R.

sufficiently explained by the following cases. A woman brought an action of debt on a deed, by which the defendant obliged himself to pay her 200*l.* on demand, if he did not take her to wife; and alleged in her declaration, that though she had tendered herself to marry the defendant, he refused and married another woman. The defendant pleaded, that after making the deed, he *offered himself to marry the plain- [*224] tiff, and she refused; *absque hoc*, "that he refused to take her for his wife, before she had refused to take him for her husband." The court was of opinion that this traverse was bad; because there had been no allegation in the declaration, "that the defendant had refused before the plaintiff had refused;" and therefore the traverse went to deny what the plaintiff had not affirmed. (z) The plea in this case ought to have been in *confession and avoidance*; stating merely the affirmative matter, that before the plaintiff offered the defendant offered, and that the plaintiff had refused him; and omitting the *absque hoc*. Again, in an action of debt on bond against the defendant, as *executrix* of *J. S.*, she pleaded in abatement, that *J. S.* died *intestate*, and that *administration* was granted to her. On demurrer, it was objected, that she should have gone on to traverse, "that she meddled as executrix before the administration granted;" because, if she so meddled, she was properly charged as executrix, notwithstanding the subsequent grant of letters of administration. But the court held the plea good in that respect. And Holt, C. J., said, "that if the defendant had taken such traverse, it had made her plea vicious; for it is

12, S. C. *Worley v. Harrison*, 3 Ad. & Ell. 669. *Bird v. Holman*, 9 M. & W. 761. [*Moffatt v. Dickson*, 13 C. B. 543.]

(z) *Crosse v. Hunt*, Carth. 99.

enough for her to show that the plaintiff's writ [*225] ought to abate; * which she has done, in showing that she is chargeable only by another name. Then, as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration; which would be against a rule of law, that a man shall never traverse that which the plaintiff has not alleged in his declaration." (a) There is, however, the following exception to this rule; viz. *that a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied.* (b) Thus, in replevin for taking cattle, the defendant made cognisance (c) that A. was seised of the close in question, and by his command the defendant took the cattle damage feasant. The plaintiff

(a) *Powers v. Cook*, 1 Lord Raym. 63; 1 Salk. 298, S. C.

(b) 1 Saund. 312 d. n. (4). *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C. *Meriton v. Briggs*, 1 Lord Raym. 39. *Edinburgh & Leith Railway Company v. Hebblewhite*, 6 M. & W. 707; 8 Dowl. 802, S. C. [In *Manby v. Cremonini*, 6 Ex. 808, an action of assumpsit, the declaration, instead of setting out specifically performance of conditions by the plaintiff, contained only a general allegation of performance. The pleas set forth several failures on the part of the plaintiff to perform conditions, and concluded with a verification. On special demurrer it was held that the fault in the declaration was cured by pleading over, and that the pleas were bad for not concluding to the country. "The pleas are traverses of facts which are necessarily implied in the declaration," per Parke, B., p. 813.]

(c) The action of *replevin* differs from other actions in the names of the pleadings. If the defendant pleads some matter confessing the taking, but showing lawful title to do so, by way of distress, such pleading is not (as it would be in other actions) called a *plea in bar*, but an *avowry*, or a *cognisance*; the former term applying to the case where the defendant sets up right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. Com. Dig. Pleader, (3 K. 13, 14). The answer to the avowry or cognisance, is called *plea in bar*; and then follow, *replication*, *rejoinder*, &c.; the ordinary name of each pleading being thus postponed by one step.

pleaded in bar, that he himself was seised of one third part, and put in his cattle, absque * hoc, [*226] that the said A. was *sole seised*. On demurrer, it was objected, that this traverse was taken on matter not alleged, — the allegation being, that A. was *seised*, not that A. was *sole seised*. But the court held, that in the allegation of seisin, that of sole seisin was necessarily implied; and that whatever is necessarily implied is traversable as much as if it were expressed. Judgment for plaintiff. (d) The court, however, observed, that, in this case, the plaintiff was not *obliged* to traverse the sole seisin; and that the effect of merely traversing the *seisin modo et formâ*, as alleged, would have been the same on the trial as that of traversing the *sole seisin*. (e)

Another rule relative to traverses, (though of a more special and limited application than those hitherto considered) is the following: *that a party to a deed who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise, &c.* (f) This rule seems to depend on the doctrine of *estoppel*.

A man is sometimes precluded in law from alleging or denying a fact in consequence of his * own previous act, allegation or denial to [*227] the contrary; and this preclusion is called an *estoppel*. (g) It may arise either from matter of *record*, from the *deed* of the party, or from matter in *pais*, that

(d) *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C. See also *Bonner v. Walker*, Cro. Eliz. 524.

(e) See also *Chambers v. Jones*, 11 East, 406.

(f) Doct. Pl. 261. *Robinson v. Corbett*, Lutw. 662. *Taylor v. Needham*, 2 Taunt. 278.

(g) An *estoppel* is, "when a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Co. Litt. 352 a.

is, matter of fact. (*h*) Thus, any allegation of fact, or any admission made in pleading (whether it be express, or implied from pleading over, without a traverse), will preclude the party from afterwards contesting the truth of the matter so alleged or admitted, upon the trial of the issue in which such pleading terminates. (*i*) This is an estoppel by matter of record. (*k*) As an instance of an estoppel by *deed*, may be mentioned the case of a bond reciting a certain fact. The party executing that bond will be precluded from afterwards denying, in any action brought upon that instrument, the fact so recited. (*l*) An example of an estoppel by matter in *pais* occurs when one man has accepted rent of another. He will be estopped from afterwards [*228] *denying, in any action with that person, that he was, at the time of such acceptance, his tenant. (*m*)

Now it is from this doctrine of estoppel apparently, that the rule under consideration as to the mode of traversing deeds has resulted. (*n*). For though a party,

(*h*) Co. Litt. 352 a.; Wms. Saund. 325 a. n. 4 and (*c*).

(*i*) Bract. 421 a.; Com. Dig. Estoppel, (A. 1). *Outram v. Morewood*, 8 East, 346; *Vooght v. Winch*, 2 Barn. & Ald. 662. *Firmin v. Crucifix*, 5 Carr. & P. 98. *Montgomery v. Richardson*, *ibid.* 247; post, *pp. 248, 249.

(*k*) See other instances of estoppel by matter of record, *Eastmure v. Lawes*, 5 Bing. N. C. 444; 7 Scott, 461; 7 Dowl. 431, S. C. *Doe v. Wright*, 10 A. & E. 763.

(*l*) *Bonner v. Wilkinson*, 5 Barn. & Ald. 682. *Lainson v. Tremere*, 1 Ad. & Ell. 792. *Baker v. Dewey*, 1 Barn. & Cress. 704. *Bowman v. Taylor*, 2 Ad. & Ell. 278. *Gaunt v. Wainman*, 3 Bing. N. C. 69. *Doe v. Seaton*, 1 Tyr. & Gr. 19; 2 C., M. & R. 728, S. C.

(*m*) Com. Dig. Estoppel, (A. 3); Co. Litt. 352 a. See also *Kieran v. Sanders*, 6 A. & E. 515. *Pickard v. Sears*, *ibid.* 469. *Gregg v. Wells*, 10 A. & E. 90; 2 P. & D. 296, S. C. *Sanderson v. Collman*, 4 Scott's N. R. 638.

(*n*) See 39 Edw. III. 3. *Taylor v. Needham*, 2 Taunt. 278.

against whom a deed is alleged, which purports to grant or demise, &c., may be allowed, consistently with the doctrine of estoppel, to say *non est factum*, viz. that the deed is not his, he is on the other hand precluded by that doctrine from saying *non concessit* or *non demisit*, because this would be to contradict his own deed, by raising a question whether it really had the effect which it purports to have. Accordingly, it will be found that in the case of a person not party, but a *stranger* to the deed, the rule is reversed, and the form of traverse in that case is *non concessit*, &c.;(o) the reason of which seems to be that estoppels do not hold with respect to strangers.(p)

*The doctrine of traverses being now dis- [*229] cussed, the next subject for consideration is,

2. The nature and properties of pleadings in *confession* and *avoidance*.

First, with respect to their *division*. Of *pleas* in confession and avoidance, some are distinguished (in reference to their subject-matter) as pleas in *justification or excuse*,(q) others as pleas in *discharge*.(r) The pleas of the former class show some justification or excuse of the

(o) *Taylor v. Needham*, 2 Taunt. 278. — N. B. The court there lay it down, that the plea of non concessit, &c., brings into issue the title of the grantor, as well as the operation of the deed. See also *Eden's case*, 6 Rep. 15; *Hellyer's case*, ibid. 25; *Hynde's case*, 4 Rep. 71 b.; 43 Edw. III. 1. *Morris v. Dimes*, 3 Nev. & M. 671. Per Parke, B., in *Wilkinson v. Lindo*, 7 M. & W. 86.

(p) In accordance with the same doctrine of estoppel, it is held * with respect to *real or personal representatives*, that they are in [*229] the same situation with *parties*, and must plead *non est factum*. *Robinson v. Corbett*, Lutw. 662. As to *privies in estate*, see 2 Hen. IV. 20. *Taylor v. Needham*, 2 Taunt. 281; 3 Nev. & M. 50 n. (e).

(q) As to the distinction between pleas of justification and excuse, see *Weaver v. Ward*, Hob. 134.

(r) Com. Dig. Pleader, (3 M. 12).

matter charged in the declaration: those of the latter, some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was unlawful; the effect of the latter, to shew that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the plea of *son assault demesne*(s) is an example; of those in discharge, a release.(t) This [*230] division applies * to *pleas* only; for *replications and other subsequent pleadings*, in confession and avoidance, are not subject to any such classification.

As to the *form* of pleadings in confession and avoidance, it will be sufficient to refer the reader to the examples in the first chapter,(u) and to observe that they always *conclude with a verification*.(v)

With respect to the *quality* of these pleadings it is to be observed that it is of their essence (as the name itself imports) to *confess* the truth of the allegation which they propose to answer or avoid. It was formerly the practice in many cases to frame such pleas with a *formal* confession or admission in terms, using the introductory phrase of *true it is, that, &c.*, and then proceeding to plead in answer to the matter thus explicitly admitted. But this method is not required by the rules of pleading, and, with a view to brevity, is now generally abandoned. It is essential, however, that the confession, though not express, should be distinctly implied in or inferable from the matter of the pleading. Thus in the example formerly given of a plea of release to an action

(s) See this plea, *suprà*, * p. 190.

(t) See this plea, *suprà*, * pp. 58, 59.

(u) *Suprà*, * pp. 58, 59, 66.

(v) See post, Sect. VII. Rule VI.

for breach of covenant (suprà ** pp. 58, 59), the evident tendency of the plea is to admit that the defendant did, as alleged * in the declaration, execute the deed and break the covenant therein contained. So in the replication of duress (suprà *p. 66), the plaintiff admits that such release was executed as alleged in the plea. If a pleading, therefore, purporting to be by way of confession and avoidance (or, in other words, not pleaded by way of traverse), does not import a confession of the adverse allegations, it is defective and insufficient.(w) Thus where the defendants were sued as sheriffs of London for an escape, and the plaintiff alleged in his declaration that his debtor, Robinson, was in custody on the 15th of December in a gaol whereof the defendants were keepers, and that they allowed him to go at large out of their custody; and the defendants pleaded that long before the said 15th day of December the said Robinson was in that gaol in the custody of certain sheriffs, their predecessors, for the debt aforesaid, and that he was allowed by *them* to go at large; this plea was insufficient; because it did not confess any escape suffered by themselves, the defendants as alleged in the declaration, but merely charged an escape on their predecessors.(x) So where the plaintiff declared in trespass *quare clausum fregit*, and charged the defendant with breaking and entering his close, and *with cattle eating up his grass there*, and the defendant pleaded that Sir T. B.

(w) *Hawe v. Planner*, 1 Saund. 13. *Earl of Manchester v. Vale*, 1 Saund. 27. *Taylor v. Cole*, 3 T. R. 298; Dy. 66 b. *M'Pherson v. Daniels*, 10 Barn. & Cress. 263. *Mountney v. Walton*, 2 Barn. & Ad. 673. *Gould v. Lasbury or Raspberry*, 4 Tyrw. 863; 1 C., M. & R. 254; 2 Dowl. 707, S. C. *Margetts v. Bays*, 4 Ad. & Ell. 489. *Weeding v. Aldrich*, 9 A. & E. 861. *Wise v. Hodsall*, 11 A. & E. 816; 3 P. & D. 510, S. C.

(x) Dy. 66 b.

was entitled by prescription to common on the close, and appointed the defendant to take care of his cattle put in there in exercise of the right of common, and that Sir *T. B.* did put in certain cattle there, — whereupon the defendant as his servant entered into the close to see the cattle, lest any damage should happen to them; and in so doing trod down the grass: this plea was adjudged to be bad, because it did not confess any trespass with cattle on the part of the defendant; the cattle mentioned in the plea not being his own, nor put into the close by him.(y) So in an action for slander, where the plaintiff alleged in the declaration that the defendant spoke certain words of him, imputing insolvency in his trade, and the defendant pleaded that he had heard the words spoken by another person, and had declared at the time of the alleged slander, that he had heard them from that person, this plea (besides other objections to it) was adjudged to be bad, because it did not confess the charge in the declaration — for the declaration imputed an unqualified assertion made by the defendant of the plaintiff, and the plea confessed only [*233] an assertion made on the authority of *another person.(z) It is not necessary, however, that a pleading in confession and avoidance should admit the truth of the adverse statement absolutely and to all purposes. The extent and nature of the admission required is defined by the following rule — *that pleadings in confession and avoidance should give colour.*(a) *Colour* is a

(y) *Earl of Manchester v. Vale*, 1 Saund. 27.

(z) *M'Pherson v. Daniels*, 10 Barn. & Cress. 263.

(a) See Reg. Plac. p. 304. *Hatton v. Morse*, 3 Salk. 273. *Hallett v. Byrt*, 5 Mod. 252. *Holler v. Bush*, 1 Salk. 394; 1 Chitty, 529, 6th edit. This rule is usually treated of in the books as if applied to pleas only. But it is in its nature equally applicable to the plea and to the subsequent pleadings.

term of the ancient rhetoricians,(b) and was adopted at an early period into the language of pleading.(c) It signifies an apparent or *prima facie* right; and the meaning of the rule that pleadings in confession and avoidance should give colour, is that they should confess the matter adversely alleged, to such an extent at least, as to admit some apparent right in the opposite party, which requires to be encountered and *avoided* by the allegation of new matter.(d) In the instances formerly given of the plea of release, and the replication of duress, in an action of covenant, the admission is absolute and unqualified — for the plea supposes that a deed of covenant had been executed, and that a breach of * it had been committed; and the [*234] replication that a deed of release had been executed; so that there is at each step an apparent right admitted in the opposite party, which is avoided in the one case by the allegation of the release, and in the other by the allegation of duress. So where to an action of *assumpsit*, the defendant pleads in confession and avoidance that he did not promise within six years before the action brought,(e) it is an absolute implied admission of the truth of the adverse allegation that he had at one time made such promise as alleged, and that there is therefore an apparent right in the plaintiff;(f) and this right is avoided by relying on the lapse of time. But the confession made by pleas of this class is in some cases of a qualified kind, or *sub modo* only. Thus to an action of trespass for taking the plaintiff's

(b) See Appendix, NOTE (40).

(c) It occurs at least as early as the reign of Edw. III. See Year-Book, 40 Edw. III. 23.

(d) See Appendix, NOTE (41).

(e) See this plea, *supra*, * p. 169.

(f) *Gale v. Capern*, 1 Ad. & Ell. 102.

corn, the defendant may plead in confession and avoidance that he was rector, and that the corn was set out for tithe, and that he took it as such rector. Now it is to be observed that this is not an absolute confession that he took the *plaintiff's corn* as alleged in the declaration. The defendant asserts on the contrary, a title to the corn in himself. But still he admits that the plaintiff was the original owner, and entitled against all the world, except the defendant. There is therefore a * confession so far as to admit some sort of apparent right or *colour* for the action; and the plea consequently complies with the terms of the rule now under consideration, and is sufficient.(g) So to an action of trespass for taking the plaintiff's sheep, the defendant may plead in confession and avoidance that *J. S.* was possessed of them and sold them to him, the defendant, in market overt — for though this does not admit the sheep to have been *the plaintiff's* when the defendant took them as alleged in the declaration, yet it admits them to have been his, subject to the effect of the sale in market overt, and therefore gives some colour to the plaintiff's claim.(h) But if to a similar declaration the defendant were to plead that *J. S.* was possessed of the sheep *as of his own property*, and sold them to him in market overt, the plea would be bad, because it tends to deny that the property was ever in the plaintiff, and gives no colour to his claim.(i) So where to a declaration in trespass for breaking the plaintiff's close, the defendant pleads that the plaintiff demised the close to him for a term of years, by virtue whereof he entered and committed the supposed tres-

(g) *Leyfield's case*, 10 Co. Rep. 88; Reg. Plac. 304.

(h) *Comyns v. Boyer*, Cro. Eliz. 485.

(i) *Vin. Abr. Colour*, G.; Doct. Pl. 77.

pass, this is a good plea in confession and avoidance; (*k*) for it * admits the plaintiff's title, sub- [*236] ject to the effect of the demise, and therefore gives sufficient colour. But if in such an action the defendant pleads that *J. S.*, a stranger, was seised in fee of the close and demised it to him for a term of years, by virtue whereof he entered and committed the supposed trespass; this is a bad plea, because it does not admit the close to be in any sense the plaintiff's, and therefore gives no colour. (*l*) In such cases as these, where the nature of the answer is to give no colour to the adverse party, the regular course is to plead by way of *traverse*.

The kind of colour to which these observations relate, being a latent quality, naturally inherent in the structure of all regular pleadings in confession and avoidance, has been called *implied* colour, to distinguish it from another kind, which is in some instances formally inserted in the pleading, and is therefore known by the name of *express* colour. (*m*) It is the latter kind to which * the technical term most [*237] usually is applied, and to this the books refer, when colour is mentioned per se, without the distinction between express and implied. Colour, in this sense, is

(*k*) *Leyfield's case*, 10 Rep. 91 a.; Doct. Pl. 78; Rast. 655; Com. Dig. Pleader, (3 M. 40); 3 Salk. 273. [Reference in the plea to the plaintiff's claim as "supposed" does not vitiate the plea. *Eavestaff v. Russell*, 10 M. & W. 365. *Gwillim v. Daniell*, 2 C., M. & R. 61, 68. Nor do the words "claimed and demanded" by the plaintiff. *Scadding v. Eyles*, 9 Q. B. 858.]

(*l*) *Argent v. Durrant*, 8 T. R. 406. *Dinham v. Beckett*, Cro. Eliz. 76. *Patrickson v. Barton*, Cro. Jac. 229; 2 Edw. IV. 8. N. B. It is to be observed, however, that where the defendant pleads that the close was the freehold of *J. S.*, or that *J. S.* was seised in fee, and that he, the defendant, as his servant, entered, without proceeding to show a *demise* by *J. S.*; there is sufficient colour; because the plea is consistent with some possessory title in the plaintiff, e. g. a lease for years. *Leyfield's case*, 10 Rep. 89 b.

(*m*) *Hatton v. Morse*, 3 Salk. 273; Holt's Inst. 561, S. C.; Reg. Plac. 304; 1 Chitty, 529, 6th edit.

defined to be “a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or colour of cause.”⁽ⁿ⁾ This is one of the most curious subtleties that belong to the science of pleading; and though now rather of rare occurrence, yet as it is still sometimes practised, and is besides illustrative of the important doctrine of *implied* colour, deserves attention. Its nature and use may be thus explained. The necessity of an implied colour (as will be apparent from the preceding explanations,) prevents the pleader, in many instances, from setting forth his case or title specially on the record, and compresses his answer into the form of a general denial of what has been adversely alleged. This will be more clearly explained by giving an example at length, of one of the cases in which the doctrine of colour has been above illustrated. Let it be supposed that the defendant, sued in an action of trespass *quare clausum fregit*,^(o) means to defend himself upon the ground that *J. S.*, a third person, being seised in fee of the land in question, [*238] demised *it to him for a term of years. If this defence be put into the form of a plea in confession and avoidance, it would be as follows:—

PLEA.

In Trespass Quare Clausum Fregit.

And for a further plea in this behalf as to the breaking and entering the said close in which &c., and the treading down, trampling upon, consuming and spoiling the said grass and herbage, the defendant says, that one *J. S.*, before the said time when &c., to wit, on the ——— day of ———, in the year of our Lord ———, was seised in his demesne as of fee of the said close in

(n) Bac. Ab. Trespass, (T. 4).

(o) See the Declaration, *suprà*, *p. 40.

which &c. And being so thereof seised afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, by a certain indenture then made between the said *J. S.*, of the one part, and the defendant of the other part, (one part of which said indenture, sealed with the seal of the said *J. S.*, the defendant now brings here into court, the date whereof is the day and year aforesaid,) the said *J. S.* did demise unto the defendant the said close in which &c., to hold the same from the ——— day of ———, then last past, to the full end and term of ——— years, then next ensuing, as by the said indenture, reference being thereto had, will more fully appear. By virtue of which demise the defendant afterwards, to wit, on the ——— day of ———, in the year ———, entered upon the said demised premises, and became and was possessed thereof for the term aforesaid*. Whereupon the defendant afterwards, to wit, at the said time when &c., broke and entered the said close in which &c., and trod down, trampled upon, consumed and spoiled the grass and herbage then and there growing, as it was lawful for him to do for the cause aforesaid. Which are the same trespasses in the introductory part of *this [*239] plea mentioned, and whereof the plaintiff hath above complained. And this the defendant is ready to verify.

This plea, as already observed, (*p*) is informal as wanting *colour*. The declaration charges the defendant with breaking and entering the *plaintiff's close*, to which the answer in substance is, that at the time of the alleged trespass, the defendant was in possession by lawful title under a third person. But if this be so, it follows that the plaintiff has not even a colourable right to maintain the action as for trespass to *his close*, for he has not even the possession; and if he had, a mere possession without some show of title is insufficient in law to give such colourable right against the true owner. The defendant, therefore, being unable to use this plea in confession and avoidance, would be driven in the regular course, to *traverse*. Prior to the change of practice introduced by the late Rules, the

(*p*) *Suprà*, *p. 236.

proper traverse in this case would have been the general issue *not guilty*. By the effect of those Rules it should seem that it would now be, "that the close *was not the close of the plaintiff*" (q) at the time of the supposed tres-

pass. When the issue joined upon this traverse [*240] came to be tried by the jury, *the defendant would have the opportunity of proving before the jury the several facts of which his defence consisted, viz. the seisin in fee of *J. S.*, and the demise to himself, because these facts would tend to sustain his allegation that the close was not the close of the plaintiff; but he would be opposed by the difficulty above explained, in setting forth these facts by way of plea on the record. In some cases, however, he may be desirous of taking the latter course, if by any means it can be made consistent with the rules of pleading. For by doing so, he obtains the following advantages. When the plaintiff's turn arrives, if he considers the plea sufficient in point of law, and consequently makes his election to reply, he will be obliged in his replication to admit part of the matters of fact of which the plea consists; a party being always prohibited (by a rule of pleading, to be hereafter explained,) from taking issue in his replication, upon more than one point. Thus, in the instance supposed, the plaintiff would be obliged to admit by his replication, either that *J. S.* was seised in fee, or that he demised to the defendant. This is of course advantageous to the defendant, because it releases him so far from the burthen of proof; while on the other hand, if he had been obliged to traverse, it would have been incumbent on him to prove the whole of his title, in order to maintain his allegation that the close does

(q) See *Heath v. Milward*, 2 Bing. N. C. 98. *Purnell v. Young*, 6 Dowl. 355. *Browne v. Dawson*, 4 P. & D. 355.

not belong to the plaintiff. Supposing the * plaintiff, on the other hand, to consider the [*241] plea as insufficient in law, he would have it in his power to demur; and the validity of the defendant's title would thus be decided by the court in bank, upon demurrer; whereas, if he had been obliged to traverse, that point of law being hid (as it were) under the general question, whether the close is the close of the plaintiff, could not have been brought forward by way of demurrer, but must have been disposed of by the jury, under the direction of the judge at nisi prius; a mode of decision far less convenient and satisfactory. These considerations are of the greater importance, where the defence happens (as in the case supposed) to involve matter of *title*, to the discussion of which a jury is of course more particularly incompetent. And in such cases, therefore, the pleaders of former days were especially anxious to avoid a traverse, and to throw their defence into the shape of a plea in confession and avoidance. To effect this, without violating the rule with respect to colour, they devised the following singular expedient. Where the plea would be informal as wanting *implied* colour, they gave in lieu of it an *express* one, by inserting a fictitious allegation of some colourable but insufficient title in the plaintiff, which they at the same time avoided by the preferable title of the defendant. Thus, in the case supposed, they would set forth the title of the defendant, as in the example, *p. 238, down to the mark *, [*242] and would then proceed to insert the following fictitious averment. "And the plaintiff claiming the said close &c., by colour of a certain charter of demise to him thereof made, for the term of his life, by the said *J. S.*, long before the said demise by him to the

defendant in form aforesaid made, (whereas nothing of or in the said close, in which, &c., ever passed into the possession of the plaintiff by virtue of that charter,) before the said time when &c., entered into and upon the said close in which &c. And thereupon the defendant afterwards, to wit, at the said time when &c., entered into and upon the said close in which &c., in and upon the plaintiff's possession thereof, and trod down, trampled upon, consumed and spoiled &c." (to the end of the plea). (r) This was called *giving colour*; and it was held to cure or prevent the objection which would otherwise arise from the want of implied colour; and the plea, with an insertion of this kind, was considered as sufficiently formal. It will be understood that in the example above given the fictitious title suggested as that under which the plaintiff claims, is a charter of demise for the term of his life, by virtue of which he entered and was possessed. The plea thus gives him some colour to complain as of a trespass [*243] to *his close*, but the colourable * title is at the same time *avoided*, by showing that of the defendant's, and alleging that the plaintiff's title, under the charter of demise, was defective in point of law, and that nothing passed under that charter. (s)

It is to be observed, that when colour was thus given, the plaintiff was not allowed, in his replication, to traverse the fictitious matter suggested by way of colour; (t) for its only object being to prevent a difficulty of *form*, such traverse would be wholly foreign to the merits of

(r) See the precedents, 9 Went. Ind. xxxvii.; 2 Edw. IV. 8.

(s) The defect in the title given by this colour is, that the charter, though a charter of demise *for life*, is not pleaded as a *feoffment*, and does not appear to have been accompanied by *livery of seisin*. See Doct. Pl. 73; Leyfield's case, 10 Rep. 89 b.

(t) 1 Chitty, 530, 6th edit.

the cause, and would only serve to frustrate the fiction, which the law in such case allows. The plaintiff would, therefore, pass over the colour without notice, and would either traverse the title of the defendant, if he meant to contest its truth in point of fact, or demur to it, if he meant to except to its sufficiency in point of law.

Such is still the course of proceeding, and the state of the law on this subject, in the few cases in which express colour is now given; and the particular example above adduced is one that might occur in the practice of the present day. (*u*)

* The practice of giving express colour, ob- [*244] tained in the mixed actions called an *assize*, and the *writ of entry, in the nature of an assize*, and the personal action of *trespass*. (*v*) The two former kinds of proceeding being now abolished, it occurs at present in trespass or trover only; nor is it even in these actions often found to be expedient. As to these *actions*, so the practice of giving express colour seems to be confined to *pleas*, and not to extend to replications, or other subsequent pleadings. (*w*) It is also to be understood, with respect to giving express colour, that though, originally, *various* suggestions of apparent right might be adopted, according to the fancy of the pleader, (*x*) and though the same latitude is perhaps still allowable, yet, in practice, there is a constant adherence to certain known fictions, which long usage has applied to the

(*u*) See recent examples of express colour, in *trover*, *Morant v.*

* *Sign*, 5 Dowl. 319; 2 M. & W. 95, S. C. In *trespass*, *Holmes* [*244] *v. Newland*, 11 A. & E. 44; 3 P. & D. 128, S. C. *Smith v. Adkins*, 8 M. & W. 362; 1 Dowl. N. S. 129, S. C. See Appendix, NOTE 42.

(*v*) 3 Reeves, 438; Doct. and Stud. p. 271.

(*w*) 1 Chitty, 624, 6th edit.; and see *Taylor v. Eastwood*, 1 East, 212; 3 Reeves, 441.

(*x*) 3 Reeves, 441; *Rastell, Trespass*.

particular case. Thus, in trespass to land, the colour universally given is that of a defective charter of demise, as in the above example. In trespass for taking goods, the usual colour is, that the defendant delivered the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. (y)

[*245] * It is to be observed that the right suggested must be *colourable* only; and that it must not amount to a *real* or *actual* right. For if it does, then the plaintiff would, of course, upon the defendant's own showing, be entitled to recover, and the plea would be an insufficient answer. For example: in trespass for taking away one hundred loads of wood, if the defendant pleads that *I. S.* was possessed of them *ut de bonis propriis*, and the plaintiff, claiming them *by colour of a deed of gift by the said I. S. afterwards made*, took them, and then the defendant retook them, — the plea is bad; for, if the plaintiff took possession of the goods, under a deed of gift from the lawful owner, he has a good title to them, and ought to recover. (z) So, in the example of colour before given, it would be bad pleading, if, instead of alleging that the plaintiff claimed by colour of a certain *charter of demise*, for the term of his life, &c., it were alleged that he claimed by colour of a certain *feoffment* for the term of his life; — for in the word *feoffment* the law intends, not only the charter of demise, but the delivery of seisin also; and the title allowed to the plaintiff would, therefore, not be defective, or colourable, but valid. (a) There are

[*246] other rules relative to express colour; (b) * but

(y) 1 Chitty, 530, 6th edit.

(z) Radford v. Harbyn, Cro. Jac. 122.

(a) Doct. Pl. 73. See Smith v. Adkins, 8 M. & W. 362; 1 Dowl. N. S. 129, S. C.

(b) See Com. Dig. Pleader, (3 M. 40), (3 M. 41).

as they seem, on examination, to be either resolvable into the same principles that have been already considered, or, where this is not the case, to be obscure and unimportant, they need not be here discussed.

The pleadings by way of *traverse*, and those by way of *confession and avoidance*, having been now separately considered, there are yet to be noticed,

3. The nature and properties of *pleadings in general*—without reference to their quality, as being by way of traverse, or confession and avoidance.

First, it is a rule, *that every pleading must be an answer to the whole of what is adversely alleged.* (c)

Therefore, in an action of trespass for breaking a close, and cutting down 300 trees, if the defendant pleads as to cutting down all but 200 trees, some matter of justification or title, and as to the 200 trees says nothing,—the plaintiff is entitled to sign judgment as by nil dicit against him in respect of the 200 trees, and to demur or reply *to the [*247] plea as to the remainder of the trespasses. In such cases the plaintiff should take care to avail himself of his advantage in this (which is the only proper) course. (cc) For if he demurs, or replies, to the plea, without signing judgment for the part not answered, the whole action is said to be *discontinued*. (d) The

(c) Com. Dig. Pleader, (E. 1), (F. 4); 1 Saund. 28, n. (3); Herlaken-den's case, 4 Rep. 62 a. Stammers v. Yearsley, 10 Bing. 35. Bush v. Parker, 1 Bing. N. C. 72. Connop v. Holmes, 4 Dowl. 451. Putney v. Swan, 2 M. & W. 72. Wood v. Farr, 5 Bing. N. C. 247. Crawshay v. Barry, 1 M. & G. 235. Clark v. Lazarus, 2 M. & G. 167. Eaton v. Johns, 1 Dowl. N. S. 602. Sheerman v. Thompson, 11 A. & E. 1027.

(cc) See Henry v. Earl, 8 M. & W. 228; 9 Dowl. 725, S. C.

(d) Com. Dig. Pleader, (E. 1), (F. 4); 1 Saund. 28, n. (3); Herlaken-den's case, 4 Rep. 62 a. Morley v. —, 12 Mod. 421. Vincent v. Beston, 1 Ld. Raym. 716. Market v. Johnson, 1 Salk. 180.

principle of this is, that the plaintiff, by not taking judgment as he was entitled to do for the part unanswered, does not follow up his entire demand; and there is consequently that sort of chasm or interruption in the proceedings, which is called in technical phrase a *discontinuance*. (e) And such discontinuance will amount to error on the record. (f) It is to be observed, however, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, — and a case, where, by the commencement of his plea,

he professes to do so, but, in fact, gives a defective and partial answer, *applying to part only.

[*248] The latter case amounts merely to insufficient pleading; and the plaintiff's course, therefore, is, not to sign judgment for the part defectively answered, but to *demur* to the whole plea. (g) It is also to be observed, that where the part of the pleading, to which no answer is given, is immaterial, or such as requires no separate or specific answer, — for example, if it be mere matter of *aggravation*, or *consequential damage*, the rule does not in that case apply. (h)

Again, it is a rule, *that every pleading is taken to con-*

(e) See another example in *Tippet v. May*, 1 Bos. & Pul. 411.

(f) *Wats v. King*, Cro. Jac. 353. A discontinuance is cured, however, after verdict, by the Statute of Jeofails, 32 Hen. VIII. c. 30; and after judgment, by *nil dicit*, confession, or *non sum informatus*, by 4 Ann. c. 16. And as the entries of continuances are now abolished by the late Rule of court, Hil. T., 4 Will. IV., it may become a question in what cases a discontinuance will now amount to *error*. See *Chitty v. Dendy*, 3 Ad. & Ell. 323.

(g) 1 Saund. 28, n. (3); *Thomas v. Heathorn*, 2 Barn. & Cress. 477. *Earl of St. Germans v. Willan*, 216. *Wood v. Farr*, 5 Bing. N. C. 248. See cases in which plaintiff may sign judgment, *Parratt v. Goddard*, 1 Dowl. N. S. 874. *Bayley v. Baker*, *ibid.* 891.

(h) 1 Saund. 28, n. (3). *Bush v. Parker*, 1 Bing. N. C. 72. *Porter v. Izod*, 1 Tyr. & G. 369.

fess such traversable matters alleged on the other side, as it does not traverse. (i). Thus, in the example given in the first chapter, (k) of an action on an indenture of covenant, the plea of release, as it does not traverse the indenture, is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release. So, the plea traversing the want of repair, (l) is an admission of the indenture *of demise. (m) The effect of such ad- [*249] mission is extremely strong; — for it concludes the party, even though the jury should improperly go out of the issue, and find the contrary of what is thus confessed on the record. (n) The rule, however, it will be observed, extends only to such matters as are *traversable*. For matters of *law*, (o) or any other matters, which are not fit subjects of traverse are not taken to be admitted by pleading over. (p) It is to be remarked, too, that the confession operates only to prevent the fact from being afterwards brought into question in the *same suit*, and that it is not conclusive as to the truth of that fact in any *subsequent action* between the same parties. (q)

(i) Com. Dig. Pleader, (G. 2); Bac. Ab. Pleas, &c. pp. 322, 386, 5th edit. Hudson v. Jones, 1 Salk. 91. Nicholson v. Simpson, Fort. 556. Jones v. Brown, 1 Bing. N. C. 484. See Noel v. Boyd, 4 Dowl. 415. Putney v. Swann, 2 M. & W. 72. Bingham v. Stanley, 1 G. & D. 237.

(k) Suprà, *pp. 58, 59.

(l) Suprà, *p. 58.

(m) See Appendix, NOTE 43.

(n) Bac. Ab. Pleas, &c. p. 322, 5th edit. Wilcox v. Servant of Skipwith, 2 Mod. 4.

(o) Vide suprà, *p. 220.

(p) 10 Ed. IV. 12. The King v. The Bishop of Chester, 2 Salk. 561. Bennion v. Davison, 3 M. & W. 179. See also Smith v. Martin, 9 M. & W. 301; 1 Dowl. N. S. 418, S. C. Another exception to the rule in question occurs in the case of a new assignment, as to which, see post, *p. 255.

(q) It would formerly conclude in a subsequent action also (if between

Such are the doctrines involved in the general rule, *that the party must either demur, or plead by way of traverse, or by way of confession and avoidance*. It remains, however, to notice

[*250] * Certain *Exceptions* to which that branch of the rule is subject, which relates to *pleading*, and which requires a party to plead either by way of *traverse*, or by way of *confession and avoidance*.

First, there is an exception in the case of *dilatory pleas*; for a plea of this kind merely opposes a matter of form to the declaration, and (as will appear on examination of the examples in the first chapter) does not tend either to deny or to confess its allegations. But *replications* and *subsequent pleadings*, following on dilatory pleas, are not within this exception.

Again, the rule is not applicable to the case of *pleadings in estoppel*.

These are pleadings, which, without confessing or denying the matter of fact, adversely alleged, rely merely on some matter of estoppel (*r*) as a ground for excluding the opposite party from the allegation of the fact. Like pleadings in abatement, they have a formal *commencement and conclusion*, to mark their special character and quality, and to distinguish them from pleadings in bar. Of this, the following is an example:—

the same parties), unless the pleader made use of a particular formula, called a *protestation*. But by the late Rule of court, Hil., 4 Will. IV., “no protestation shall hereafter be made in any pleadings, but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.”

(*r*) As to the doctrine of *estoppel*, vide *suprà*, * pp. 227, 228.

* REPLICATION.

[*251]

And the plaintiff saith, that the defendant *ought not to be admitted or received* to plead the plea by him above pleaded, because he saith, &c. [And then after stating the previous act, allegation, or denial of the opposite party, upon which the estoppel is alleged to arise, the pleading concludes thus:] Wherefore he prays judgment, if the defendant *ought to be admitted or received to his said plea*, contrary to his own acknowledgment and the said record, &c., [or as the case may be.](s)

If an estoppel appears on the face of the adverse pleading, it is a ground for demurrer. (t) If it does not appear, the party wishing to take advantage of it, must specially plead the fact which constitutes the estoppel (supposing it to be by record or deed), as in the above example. (u) And except by way of special plea or demurrer, an estoppel by record, or deed, is not available. (v) Thus, in an action of covenant, the plaintiff declared upon a deed, reciting that he was the inventor of certain looms, and had * given [*252] the defendants permission to use them, in consideration of which they were to pay him certain sums; the defendants pleaded that the plaintiff was not the true inventor; and the latter, instead of demurring, took issue in fact on the plea. It was held, that the defendants were not estopped by the recital of the

(s) 3 Chitty, 1069, 6th edit.; and see other examples of pleading in estoppel in *Took v. Glascock*, 1 Saund. 257. *Plummer v. Woodburn*, 4 Barn. & Cress. 625; 2 Rich. P. C. P. 440. *Eastmure v. Lawes*, 5 Bing. N. C. 444; 7 Scott, 661; 7 Dowl. 431, S. C. *Doe v. Wright*, 10 A. & E. 763. *Sanderson v. Collman*, 4 Scott's N. R. 638. [*Queen v. Mayor of Sandwich*, 10 Q. B. 563.]

(t) *Lainson v. Tremeere*, 1 Ad. & Ell. 792. *Bowman v. Taylor*, 2 Ad. & Ell. 278.

(u) *Vooght v. Winch*, 2 B. & Ald. 662.

(v) *Doe v. Huddart*, 2 C., M. & R. 316. *Wilson v. Butler*, 4 Bing. N. C. 756. *Magrath v. Hardy*, *ibid.* 782.

deed, from proving that the plaintiff was not the true inventor. (w) But an estoppel in pais may be given in evidence without being specially pleaded. (x)

There are also certain specific pleas which present the anomaly of being neither by way of traverse nor of confession and avoidance, and which therefore deserve notice in this place. These are the pleas of *Tender*, and of *Payment into Court*. By the first of these, the defendant alleges that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into Court ready to be paid to him. (y) By the second of these pleas, the defendant alleges simply that he brings a sum of money into Court ready to be paid to the plaintiff, and that the latter has no claim [* 253] to *any larger amount. (z) They are both in the nature of pleas in bar, as they give an answer in point of fact, and upon the merits; but they are in the nature of confession only, without avoidance, for they admit the right of action to exist.

Another exception to that branch of the general

(w) *Bowman v. Rostron*, 2 Ad. & Ell. 295; see *Kienan or Kieran v. Sandars*, 6 A. & E. 515; 1 Nev. & P. 628, S. C.

(x) *Kienan or Kieran v. Sandars*, 6 A. & E. 515; 1 Nev. & P. 625, S. C.; 1 Wms. Saund. 325, a., n. (c).

(y) As to a plea of tender to a bill of exchange, see *Poole v. Sunbridge*, 1 Mur. & Hurl. 32.

(z) The form of this plea is regulated by Rule of court, Hil. T., 4 Will. IV. amended by R. G., T. T. 1 Vict. See as to this plea, *Jones v. Reade*, 5 Dowl. 216, and the cases cited in Tidd's N. P. p. 813. *Stephens v. Ufford*, 7 Car. & P. 97. *Marshall v. Whitewell*, 1 Tyrw. & G. 485. *Porter v. Izat*, 1 Tyrw. & G. 639. *Booth v. Howard*, 1 Wil., Wol. & Dav. 54. *Armfield v. Burgin*, 6 M. & W. 281; 8 Dowl. 247, S. C. *Wright v. Goddard*, 8 A. & E. 144. *Steavenson v. Corporation of Berwick*, 1 Q. B. 154; 4 P. & D. 546, S. C. This plea cannot be pleaded with a plea in denial of the same cause of action. *Thompson v. Jackson*, 1 M. & G. 242. [In an action of debt, it must be pleaded to the damages as well as to the debt. *Lowe v. Steele*, 15 M. & W. 380.]

rule, which requires the pleader either to traverse or to confess and avoid, arises in the case of what is called a *new assignment*.

It has been seen that the declarations are conceived in very general terms; a quality which they derive from their adherence to the tenor of those simple and abstract formulæ, — the original writs — by which all suits were in ancient times commenced. The effect of this is, that, in some cases, the defendant is not sufficiently guided by the declaration, to the real cause of complaint; and is, therefore, led to apply his plea to a different matter from that which the plaintiff has in view. A new assignment is a method of pleading to * which the plaintiff in such cases is [*254] obliged to resort in his replication, for the purpose of setting the defendant right. An example shall be given in an action for assault and battery. A case may occur in which the plaintiff has been *twice assaulted* by the defendant; and one of these assaults may have been justifiable, being committed in self defence, — while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the *latter*, it will be found, by referring to the example formerly given (*a*) of a declaration for assault and battery, that the statement is so general, as not to indicate to which of the two assaults the plaintiff means to refer. (*b*) The defendant may, therefore, suppose, or affect to suppose, that the *first* is the assault intended, and will plead son assault, mesne, as in the example *suprà*, * p. 190. This plea the plaintiff

(a) *Suprà*, * p. 39.

(b) As for the *day* alleged in the declaration (which may be supposed sufficient, in general, to identify the assault referred to), it will be shown hereafter that it is not considered as material to be proved in such a case, and is consequently alleged without much regard to the true state of fact.

cannot safely *traverse*; because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. [*255] * And it is evidently *reasonable* that he should have this right; for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer by a mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer, or for pleading in confession and avoidance, has no course, but by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the *first*, but for the *second* assault; and this is called a *new assignment*. (c) Its form, in the example here chosen, would be as follows:—

REPLICATION.

*To the Plea of Son assault demesne in * p. 190.*

By way of new assignment.

And the plaintiff says, that he brought this action, not for the trespasses in the said second plea acknowledged to have been done, but for that the defendant heretofore, to wit, on the ——— [*256] day of ———, in the year of our Lord ———, * with force and arms, upon another and different occasion, and for another

(c) He may guard himself by anticipation against this necessity, in the particular case supposed, by charging the defendant in the declaration with *both* the assaults, which (in the form of different counts) is allowable. (As to the use of several counts, vide post, Sect. III.) If both assaults are thus charged, the defendant of course must answer both in his plea, and the reason for the new assignment fails.

and different purpose than in the second plea mentioned, made another and different assault upon the plaintiff than the assault in the said second plea mentioned and then beat, wounded, and ill-treated him in manner and form as the plaintiff hath above thereof complained; which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done. And this the plaintiff is ready to verify.

The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the assault last mentioned, the first being now out of question.

By way of farther example may be mentioned a case that arises in trespass *quare clausum fregit*, and was formerly of very frequent and ordinary occurrence. In this action, if the plaintiff declares for breaking his close in a certain parish, without naming or otherwise describing the close, if the defendant happen to have *any* freehold land in the same parish, he may be supposed to mistake the close in question for his own, and may therefore plead what is called *the common bar*,^(d) viz. that the close in which the trespass was committed is * his own freehold.^(e) And then upon [*257] the principle already explained, it will be necessary for the plaintiff to new assign, alleging that he brought his action in respect of a different close from that claimed by the defendant as his freehold.^(f) But by a recent Rule of Court, (Hil. T. 4 Will. IV.) the plaintiff is now bound to designate the close or

(d) It has been otherwise called a *bar at large* and a *blank bar*. See *Lambert v. Stroother*, Willes, 223.

(e) In the common bar it seems that the defendant is not bound to name his close. 1 Saund. 299, b., n. (5). *Elwis v. Lombe*, 6 Mod. 117; Salk. 453, S. C. sed qu.; see *Cocker v. Crompton*, 1 Barn. & Cress. 489.

(f) *Baldwin's case*, 2 Rep. 18; Appendix, NOTE 44.

place in the declaration, by name or other sufficient description. (g)

The examples of new assignment that have been given consist of cases where the defendant in his plea *wholly* mistakes the subject of complaint. But it may also happen that the plea correctly applies to *part* of the injuries, while owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus in trespass *quare clausum fregit* for repeated trespasses, the declaration usually states, that the defendant on divers days and times before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, &c. without setting forth more specifically in what parts

of the close, or on what occasions the defendant [*258] ant *trespassed. (h) Now the case may be, that

the defendant claims a right of way over a certain part of the close, and in exercise of that right has repeatedly entered and walked over it; but has also entered and trod down the soil, &c. on other occasions and in parts out of the supposed line of way; and the plaintiff, not admitting the right claimed, may have intended to point his action both to the one set of trespasses and to the other. But from the generality of the declaration the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may, therefore, in his plea allege, as a complete answer to the whole complaint that he has a right of way by grant, &c. over the said close; and if he does this, and the plaintiff confines himself in his replication to a traverse of that plea, and the defendant at the trial

(g) This Rule was recommended by the Common Law Commissioners. Third Report, p. 54.

(h) See the example, 9 Went. 97.

proves a right of way as alleged, the plaintiff would be precluded (upon the principle already explained) from giving evidence of any trespasses committed out of the line or track in which the defendant should thus appear entitled to pass.*(hh)* His course of pleading in such a case, therefore, is both to traverse the plea, and also to new assign, by alleging that he brought his action not only for those trespasses supposed by the defendant, but for others committed on other occasions, and in other parts of the close out of the supposed way — which is usually called a new * assignment *extra* [*259] *viam* ;*(hhh)* or, if he means to admit the right of way, he may new assign simply, without the traverse.*(i)*

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration*, it always occurs in answer to a *plea*, and is, therefore, in the nature of a *replication*. It is not used in any other part of the pleading, because the statements subsequent to the declaration are not in their nature such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment.

A new assignment chiefly occurs in an action of *trespass*, but it seems to be generally allowed in all actions

[*(hh)* *Bracegirdle v. Peacock*, 8 Q. B. 174. Even though the right of way proved is in an entirely different part of the close from that where the damage alleged in the declaration was done, the defendant will nevertheless win, as the only point in issue is whether a right of way exists. Other material allegations are admitted. *Webber v. Sparkes*, 10 M. & W. 485; *Huddart v. Rigby*, L. R. 5 Q. B. 139. See also as involving the same principle, *Hawthorn v. Newcastle Railway Co.*, 3 Q. B. 734. And generally, if the plaintiff simply traverses a justification stated in the plea, he will be regarded as admitting that the justification applies to the whole declaration, unless the contrary necessarily appears on the face of the plea. *Bowen v. Jenkin*, 6 A. & E. 911; *Page v. Hatchett*, 8 Q. B. 187.]

[*(hhh)* See *Loweth v. Smith*, 12 M. & W. 582.]

(i) See examples of a new assignment *extra viam*, 9 Went. 323, 396.

in which the form of declaration makes the reason of the practice equally applicable.(*k*)

Several new assignments may occur in the course of the same series of pleading. Thus, in the first of the above examples, if it be supposed that *three* different assaults had been committed, two of which [**260*] ** were* justifiable, the defendant might plead as above to the declaration, and then, by way of plea to the new assignment, he might again justify in the same manner another assault; upon which it would become necessary for the plaintiff to new assign a third, and this upon the same principle by which the first new assignment was required.(*l*)

A new assignment is said to be *in the nature of a new declaration*.(*m*) It seems however to be more properly considered as a repetition or explanation of the declaration;(n) differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much *certainty*, or specification of circumstances, as the declaration itself.(o) In some cases, indeed, it should be even *more* particular, so as to avoid the necessity of *another* new assignment. Thus, where the plaintiff declared in trespass *quare clausum fregit* without naming the close, and the defendant pleaded the common bar, (which, as we have seen, obliged the

(*k*) 1 Chitty, 825, 8th ed.; Vin. Ab. Novel Assignment, 4, 5; 3 Went. 151. *Batt v. Bradley*. Cro. Jac. 141. *Haydon v. Thompson*, 1 Ad. & Ell. 210. As to new assignment in *debt*, see *Rogers v. Custance*, 1 Q. B. 77; 4 P. & D. 574, S. C. In *case* for negligence, *Wyld v. Pickford*, 8 M. & W. 443. In *assumpsit*, *Wheeler v. Senior*, 7 M. & W. 562.

(*l*) 1 Chitty, 641; 1 Saund. 299 c. *Pugh v. Griffiths*, 7 A. & E. 827.

(*m*) Bac. Ab. Trespass, (I.), 4, 2; 1 Saund. 299 c.

(*n*) See 1 Chitty, 624.

(*o*) Bac. Ab. ubi *suprà*; 1 Chitty, 637.

plaintiff to new assign,) he was always required in his new assignment, either to give his * close [*261] its name, or otherwise sufficiently describe it, (p) though such name or description was not till the recent Rule of court, Hil. 4, W. 4, required in the declaration. (q)

By a general rule formerly noticed, all pleadings are taken to confess such traversable matters alleged on the other side, as they do not traverse. (r) This rule, however, does not apply to a new assignment, which is considered as making no admission of the truth of the matter stated in the plea. In effect it states only that the matter of the plea is irrelevant, as not applying to the true cause of action. Any inquiry into its truth or sufficiency is consequently superseded. (s)

The rule under consideration and its * excep- [*262] tions being now discussed, the last point of remark relates to an inference or deduction to which it gives rise.

It is implied in this rule, that as the proceedings must

(p) Semb. Dy. 264 a.; Com. Dig. Pleader, (3 M. 34); see an example, 9 Went. 187.

(q) On the subject of new assignment, see 1 Saund. 299 a., n.(6); Barnes v. Hunt, 11 East, 451. Cheasley v. Barnes, 10 East, 73. Taylor v. Smith, 7 Taunt. 156. Taylor v. Cole, 3 T. R. 292. Lambert v. Hodgson and Prince, 1 Bing. 317. Phillips v. Howgate, 5 Barn. & Ald. 220. Monprivatt v. Smith, 2 Camp. 175. Bowen v. Jenkin, 6 A. & E. 911. Freeman v. Crafts, 4 M. & W. 4. James v. Lingham, 5 B. N. C. 554. Cowling v. Higginson, 4 M. & W. 245. [Moses v. Levy, 4 Q. B. 213. Broughton v. Jackson, 18 Q. B. 378.] Some of these cases will be found to involve nice distinctions as to the necessity in particular instances of a new assignment.

(r) Suprà, *p. 248.

(s) Norman v. Wescombe and Another, 1 Mur. & Hurl. 18; 2 M. & W. 849, S. C. See also as to the effect of a new assignment, per Parke, B., in Dand v. Kingscote, 6 M. & W. 197. Brancker v. Molyneux, 1 M. & G. 710; 1 Scott's N. R. 553, S. C. Alston and Another v. Mills, 9 A. & E. 248.

either be by demurrer, traverse, or confession and avoidance, so *any* of these forms of opposition to the last pleading is in itself *sufficient*.

There is however an exception to this, in a case which the books consider as anomalous and solitary. It is as follows: — if in debt on a bond conditioned for the performance of an award, the defendant pleads that no award was made, and the plaintiff in reply alleges, that an award was made, setting it forth, it is held that he must also proceed to state a *breach* of the award; and that without stating such breach, the replication is insufficient.^(t) This, as has been observed, is an anomaly, for, as by alleging and setting forth the award, he fully *traverses* the plea which denied the existence of an

award, the replication would seem, according [*263] to * the general rule under consideration, to be sufficient without the specification of any breach. And in accordance with that rule, it is expressly laid down that in all other cases, “if the defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted.”^(u)

(t) 1 Saund. 103, n. (1). *Meredith v. Alleyn*, 1 Salk. 138; Carth. 116, S. C. *Nicholson v. Simpson*, Stra. 299. In *Meredith v. Alleyn*, a reason is assigned for the exception, but not (as the author conceives) a satisfactory one. Though this is considered a solitary case, it may be observed that another analogous one is to be found, *Gayle v. Betts*, 1 Mod. 227. See also, per Tindal, C. J., in *Richardson v. Tomkies*, 9 Bing. 53.

(u) Per Holt, C. J., *Meredith v. Alleyn*, 1 Salk. 138.

RULE II.

UPON A TRAVERSE ISSUE MUST BE TENDERED.

In the account given in another place (*v*) of traverses, it was shown, that the different forms all involve a *tender of issue*. The rule under consideration prescribes this as a necessary incident to them, and establishes it as a general principle, that wherever a traverse takes place, or, in other words, wherever a denial or contradiction of fact occurs in pleading, issue ought at the same time to be tendered on the fact denied. The reason is, that as by the contradiction, it sufficiently appears what is the issue or matter in dispute between the parties, it is time that the pleading should now *close, and that the method of deciding [*264] this issue should be adjusted.

The formulæ of tendering the issue in fact, vary of course according to the mode of trial proposed.

The tender of an issue to be tried by *jury*, is by a formula called the *conclusion to the country*. This conclusion is in the following words when the issue is tendered by the *defendant*:—“And of this the defendant puts himself upon the country.” When it is tendered by the *plaintiff*, the formula is as follows:—“And this the plaintiff prays may be inquired of by the country.” (*w*) It is held, however, that there is no material difference between these two modes of expression, and that if *ponit se* be submitted for *petit quod inquiratur*, or vice versâ, the mistake is unimportant. (*x*)

(*v*) Suprà, *p. 168.

(*w*) Heath's Maxims, 68. *Weltale v. Glover*, 10 Mod. 166; Bract. 57; Ry. Plac. Parl. 146.

(*x*) *Weltale v. Glover*, 10 Mod. 166.

Of the tender of issue thus concluding to the country, several examples have already been given in this work, (y) and to these it will now be sufficient to refer.

The form of tendering an issue to be tried *by record* is this:—

[*265]

* PLEA.

Of Judgment recovered.

In Assumpsit.

And the defendant, by —— his attorney, says, that the plaintiff heretofore, to wit, in —— term, in the —— year of the reign of our Lady the now Queen, in the court of our said Lady the Queen, before the Queen herself, the same court then and still being holden at Westminster, in the county of Middlesex, impleaded the defendant in a certain plea of trespass on the case on promises, to the damage of the plaintiff of —— pounds, for the not performing the same identical promises and undertakings in the said declaration mentioned. And such proceedings were thereupon had in the same court in that plea, that afterwards, to wit, in that same term, the plaintiff by the consideration and judgment of the said court recovered in the said plea against the defendant —— pounds for the damages which he had sustained, as well by reason of the not performing of the same promises and undertakings in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said court of our said Lady the Queen, before the Queen herself, at Westminster aforesaid, more fully appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void. And this the defendant is ready to verify by the said record.

REPLICATION.

And the plaintiff says, that there is not any record of the said supposed recovery remaining in the said court of our said Lady the

(y) *Supra*, * pp. 58, 67.

Queen, before the Queen herself, in manner and form as the said defendant hath above in his said plea alleged. And this he, the plaintiff, is ready to verify, when, *where and [*266] in such manner as the court here shall order, direct or appoint. (z)

The tender of an issue to be decided by *certificate* or *witnesses* is by the following formula:—“And this the plaintiff” [or defendant] “is ready to verify, when, where and in such manner as the court here shall order, direct or appoint.” (a)

With respect to the *extraordinary* methods of trial, their occurrence is too rare to have given rise to any illustration of the rule in question. It refers chiefly to traverses of such matters of fact as are triable by *jury*, or (as it is otherwise expressed) the *country*; and, therefore, we find it propounded in the books most frequently in the following form: *that, upon a negative and affirmative, the pleading shall conclude to the country; but otherwise, with a verification.* (b)

To the rule, in whatever form expressed, there is the following exception: *that when new matter is introduced, the pleading should always conclude with a verification.* (c)

*A traverse may sometimes involve the alle- [*267] gation of new matter; and in such instances

(z) 3 Chitty, 795, 1079, 6th edit.; Tidd, 800, 801, 8th edit., where see the further entry with which the replication in such case concludes, giving a day to produce the record.

(a) See Co. Ent. 180 b.; Rast. 288. *Thorn v. Rolfe*, Moore, 14; Benl. 86, S. C.; 3 Chitty, 1220, 6th edit.

(b) Com. Dig. Pleader, (E. 32); 1 Saund. 103, n. (1).

(c) 1 Saund. 103, n. (1), and the authorities there cited. *Whitehead v. Buckland*, Stile, 401. *Cornwallis v. Savery*, 2 Burr. 722. [*267] *Vere v. Smith*, 2 Lev. 5; 1 Vent. 121, S. C. *Sayre v. Minns*, Cowp. 575. *Henderson v. Withy*, 2 T. R. 576. *Calvert v. Gordon*, 7 Barn. & Cress. 809. *Goodchild v. Pledge*, 5 Dowl. 89. See *Low v. Burrows*, 2 Ad.

the conclusion must be with a verification, and not to the country. An illustration of this is afforded by a case of very ordinary occurrence, viz. where the action is in debt on a bond conditioned for performance of covenants. If the defendant pleads generally, performance of the covenants, and the plaintiff in his replication relies on a breach of them, he must show specially in what that breach consists, for to reply generally that the defendant did not perform them, would be too vague and uncertain. (e) His replication, therefore, setting forth, as it necessarily does, the circumstances of the breach, discloses new matter; and consequently though it is a direct denial or traverse of the plea, it must not tender issue, but must conclude with a verification. (f) So in another common case, in an action of debt on bond conditioned to indemnify the plaintiff [*268] against the consequences of a certain act, *if the defendant pleads non damnificatus, and the plaintiff replies alleging a damnification, he must, on the principle just explained, set forth the circumstances, and the new matter thus introduced will make a verification necessary. (g) To these it may be useful to add another example. The plaintiff declared in debt, on a bond conditioned for the performance of certain covenants by the defendant, in his capacity of clerk to the plaintiff; one of which covenants was, to account for all the money that he should receive. The defendant & Ell. 483. [Wood v. Kerry, 2 C. B. 515; Scott v. Wedlake, 7 Q. B. 766.] The general plea of bankruptcy under The Bankrupt Act, 6 Geo. IV. c. 16, is an instance of a plea containing new matter, that concludes nevertheless to the country. Sheen v. Garrett, 6 Bing. 686. But this is an anomalous case.

(e) This results from a rule which will be discussed hereafter. See Sect. IV. Rule VII.

(f) See an example in *Gainsford v. Griffith*, 1 Saund. 54.

(g) See an example in *Richards v. Hodges*, 2 Saund. 82.

pleaded performance. The plaintiff replied, that on such a day, such a sum came to his hands, which he had not accounted for. The defendant rejoined, that he *did* account, and in the following manner:—that thieves broke into the counting-house and stole the money, and that he acquainted the plaintiff of the fact; and he concluded with a verification. The court held, that though there was an express affirmative that he did account, in contradiction to the statement in the replication, that he did not account, yet that the conclusion with a verification was right; for that *new matter* being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a sur-rejoinder, and answer it by traversing the robbery. (*h*)

*The application, however, to particular cases, [*269] of this exception, as to the introduction of *new matter*, is occasionally nice and doubtful; and it becomes difficult sometimes to say whether there is any such introduction of new matter as to make the tender of issue improper. Thus, in debt on a bond conditioned to render a full account to the plaintiff, of all such sums of money and goods as were belonging to *W. N.* at the time of his death,—the defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied, that a silver bowl, which belonged to the said *W. N.* at the time of his death, came to the hands of the defendant, viz. on such a day and year; “and this he is ready to verify,” &c. On demurrer, it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative; but the court thought it well concluded, as new matter was introduced. However, the learned judge who reports the case thinks it clear that the replication

(*h*) *Vere v. Smith*, 2 Lev. 5; 1 Vent. 121, S. C.

was *bad*; and Mr. Serjeant Williams expresses the same opinion, — holding that there was *no* introduction of new matter, such as to render a verification proper. (*i*)

[*270] * To the same exception formerly belonged the case of special traverses, which always concluded, until the Rule of Hil. T. 4 Wil. IV., with a verification. But by that Rule it is provided (as stated in a former part of this work) (*k*) that they should henceforth conclude to the country.

RULE III.

ISSUE, WHEN WELL TENDERED, MUST BE ACCEPTED. (*l*)

If issue be well tendered both in point of substance and in point of form, nothing remains for the opposite party, but to accept or join in it; and he can neither demur, traverse, nor plead in confession and avoidance. (*m*)

The acceptance of the issue, in case of a conclusion to the *country*, i. e. of trial by *jury*, may (as explained

(*i*) *Hayman v. Gerrard*, 1 Saund. 102; but see *Cornwallis v. Savery*, Burr. 772. *Sayre v. Minns*, Cowp. 575. See *Low v. Burrows*, 2 A. & E. 483, as to the onus probandi on such a replication, where it concludes to the country. For instances where a conclusion to the country is proper, see *Fleming v. Cooper*, 5 A. & E. 221. *Brunskill v. Robertson*, 9 A. & E. 840. *Edinburgh & Leith Railway Company v. Hebblewhite*, 6 M. & W. 707; 8 Dowl. 802, S. C. *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36, S. C. *Smith v. Tanner*, 1 M. & G. 802; 2 Scott's N. R. 77, S. C. Where a verification is necessary, see *Johnson v. Jones*, 9 A. & E. 809. *Fowler v. Rickerby*, 2 M. & G. 760.

(*k*) *Suprà*, *p. 210. See *Cardwardine v. Watkins*, 7 Dowl. 484. [*Hutt v. Morrell*, 11 Q. B. 425, 442.]

(*l*) Bac. Ab. Pleas, &c. p. 363, 5th edit. *Digby v. Fitzharbert*, Hob. 104. *Wilson v. Kemp*, 2 M. & S. 549. "In all pleadings, wherever a traverse was first properly taken, the issue closed." — Gilb. C. P. 66.

(*m*) But he may plead in *Estoppel*.

in the first chapter)(*n*) either be added *in making up the issue, or may be delivered before that transcript is made up. It is in both cases called the *similiter*; and in the latter case a *special similiter*. The form of a special similiter is thus:—“And the plaintiff,” [*or* “defendant,”] as to “the plea,” [*or* “replication,” &c.] “of the defendant,” [*or* “plaintiff,”] “whereof he hath put himself upon the country,” [*or* “whereof he hath prayed it may be inquired by the country,”] “doth the like.” The similiter, when added in making up the issue or paper-book, is simply this:—“And the said plaintiff” [*or* “defendant”] “doth the like.”

As the party has no option in accepting the issue, when well tendered, and as the similiter may in that case be added for him, the acceptance of the issue when well tendered may be considered as a mere matter of *form*. It is a form, however, which should be invariably observed; and its omission has sometimes formed a ground of successful objection,—even after verdict.(*o*)

The rule expresses, that the issue must be accepted only when it is *well* tendered. For if the opposite party thinks the *traverse* bad in substance *or [*272] in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the similiter, but may *demur*; (*p*) and if it has been added for him, may strike it out, and *demur*.(*q*)

(*n*) *Suprà*, * pp. 78, 79.

(*o*) *Griffith v. Crockford*, 3 Brod. & Bing. 1; but see 2 Saund. 319, n. 6). *Stockdale v. Chapman*, 4 Ad. & Ell. 419. *Brook v. Finch*, 6 Dowl. 313. *Handford v. Handford*, *ibid.* 473. *Siboni v. Kirkman*, 3 M. & W. 46.

(*p*) But he cannot *plead over*, as we have seen he may do in case of an immaterial traverse with an *absque hoc*. *Whitehead v. Buckland, Stile*,

(*q*) *Vide suprà*, * p. 80.

The similiter, therefore, serves to mark the acceptance both of the question itself and the mode of trial proposed. It seems originally, however, to have been introduced in a view to the *latter* point only. The resort to a jury, in ancient times, could in general be had only by the mutual *consent* of each party. (r) It appears to have been with the object of expressing such consent, that the similiter was, in those times, added, in drawing up the record; and from the record, it afterwards found its way into the written pleadings. Accordingly, no similiter or other acceptance of issue is necessary, when recourse is had to any of the *other modes* of trial; and the rule in question does not ex-
 [*273] tend *to these. Thus, when issue is tendered to be tried by the *record*, as in the above example, (* pp. 265, 266), the plaintiff is entitled to consider the issue as complete upon such tender; (s) and no acceptance of it on the other side is essential.

The rule in question extends to an issue in *law* as well as an issue in *fact*; for by analogy (as it would seem) to the similiter, the party whose pleading is

402, where Roll, C. J., says, the plaintiff "must either demur or join issue with you; and I have not heard of *passing over* in this case, as may be done in the case of a traverse," (meaning a traverse with an *absque hoc*). So it is said, per Holt, C. J., that pleading over, when issue is offered, is a *discontinuance*. *Campbell v. St. John*, 1 Salk. 219. [But if a party improperly concludes a traverse with a verification, the other party is not obliged to demur, but may deny the allegation of the preceding pleading and conclude to the country. *Marson v. Lund*, 16 Q. B. 344.]

(r) See Appendix, NOTE 26. It may be observed, that this is still indicated by the form of the *venire facias*; which contains the formal clause, "because as well the said defendant, as the said plaintiff," &c. "have put themselves upon that jury." Vide *suprà*, *p. 86.

(s) And the replication may therefore conclude with an entry that a day is given to inspect the record, *Tipping v. Johnson*, 2 Bos. & Pul. 302. *Jackson v. Wickes*, 2 Marsh. 354; 7 Taunt. 30, S. C. *Pitt v. Knight*, 1 Saund. 96 a.; Tidd, 800, 801, 8th edit.

opposed by a demurrer, is required formally to accept the issue in law which it tenders, by the formula called a *joinder in demurrer*; of which an example was given in the first chapter. (t) However, it differs in this respect from the similitur, — that whether the issue in law be well or ill tendered, — that is, whether the demurrer be in proper form or not, — the party against whom it is tendered, is equally bound to join in demurrer. For it is a rule, *that there can be no demurrer upon a demurrer*; (u) because the first is sufficient, notwithstanding any inaccuracy in its form, to bring the record before the court for their adjudication; and as for *traverse or pleading in confession and avoidance*, there is of course no ground for them, * while [*274] the last pleading still remains unanswered, and there is nothing to oppose but an exception in point of law.

SECTION II.

OF RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE.

In a view to the materiality of the issue, it is of course necessary that at each step of the series of pleadings by which it is to be produced, there should be some pertinent and material allegation or denial of fact. On this subject, therefore, a general rule may be propounded in the following form: —

(t) *Suprà*, * p. 61.

(u) *Bac. Ab. Pleas, &c. (N. 2).* And demurrer upon demurrer is a *discontinuance*. *Campbell v. St. John*, 1 Salk. 219.

RULE.

ALL PLEADINGS MUST CONTAIN MATTER PERTINENT AND MATERIAL.

Thus, if to an action of assumpsit against an administratrix, laying promises by the intestate, she pleads that she, the *defendant* (instead of the intestate), did not promise, the plea is obviously immaterial and bad. (*v*)

So where in replevin for taking cattle, the [*275] *defendant avowed taking them in the close in which &c., for rent in arrear, and the plaintiff pleaded in bar to the avowry, that the cattle were not levant and couchant on the close in which, &c., the plea was holden bad on demurrer — for it is a general rule that all things upon the premises are distrainable for rent in arrear, and the levancy and couchancy of the cattle is immaterial, unless under special circumstances, such as did not appear by the plea in bar to have existed in this case. (*w*)

With respect to *traverses* in particular, this general doctrine is illustrated in the books by subordinate rules of a more special kind. Thus it is laid down,

1. *That traverse must not be taken on an immaterial point.* (*x*)

This rule prohibits first the taking of a traverse on a point wholly immaterial. Thus, where to an action of

(*v*) Anon. 2 Vent. 196.

(*w*) Jones v. Powell, 5 Barn. & Cress. 647. See also Hall v. Tapper, 3 Barn. & Ad. 655.

(*x*) Com. Dig. Pleader, (R. 8), (G. 10); Bac. Ab. Pleas, &c. (H. 5). Walker v. Jones, 4 Tyrw. 915; 2 C. & M. 672, S. C. Burroughs v. Hodgson, 9 A. & E. 499; 1 P. & D. 329. Radford v. Smith, 3 M. & W. 254; 6 Dowl. 381, S. C. Spaeth v. Hare, 9 M. & W. 326; 1 Dowl. N. S. 595, S. C. De Medina v. Norman, 9 M. & W. 820. Gwynne v. Burnell, 6 Bing. N. C. 458.

trespass for assault and battery the defendant pleaded that a judgment was recovered, *and [*276] execution issued thereupon against a third person, and that the plaintiff, to rescue that person's goods from the execution, assaulted the bailiffs; and that in aid of the bailiffs, *and by their command*, the defendant molliter manus imposuit upon the plaintiff, to prevent his rescue of the goods, it was holden that a traverse of the *command of the bailiffs* was bad. For even without their command, the defendant might lawfully interfere to prevent a rescue, which is a breach of the peace. (y)

So, by this rule a traverse is not good when taken on matter, the allegation of which was premature, though in itself not immaterial to the case. Thus, if in debt on bond, the plaintiff should declare that at the time of sealing and delivery, the defendant was of full age, the defendant should not traverse this, because it was not necessary to allege it in the declaration; though if in fact he was a minor, this would be a good subject for a plea of infancy, concluding with a verification — to which the plaintiff might then well reply the same matter, viz. that he was of age. (z)

Again, this rule prohibits the taking of a *traverse [*277] on matter of *aggravation*; that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself. Thus in trespass for chasing sheep, per quod the sheep died, the dying of the sheep being aggravation only, is not

(y) *Bridgwater v. Bythway*, 3 Lev. 113. Aliter, if not done to prevent a rescue: for in a case where defendant justifies merely as assistant to, and by command of, a person executing legal process, the command is traversable. *Britton v. Cole*, 3 Salk. 409.

(z) *Sir Ralph Bovy's case*, 1 Vent. 217; where see another example. [*Ricketts v. Loftus*, 14 Q. B. 482.]

traversable. (a) The rule also prohibits the traverse of *consequential damage* resulting from facts previously stated. (b) Thus, where it was alleged as a breach of covenant, that a ship was not tight, &c. and fitted for the voyage, pursuant to the covenant in that behalf, whereby she was obliged to put back, and by reason thereof was detained; a plea "as to so much of the declaration as relates to the detaining," was held bad. (c) So it is laid down that, in general, traverse is not to be taken on matter of *inducement*, that is, matter brought forward only by way of explanatory introduction to the main allegations; but this is open to many exceptions, — for it often happens that introductory matter is in itself essential and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed. (d)

While it is thus the rule that traverse must [*278] not *be taken on an immaterial point, it is on the other hand to be observed, *that where there are several material allegations, it is in the option of the pleader to traverse which he pleases.* (e) Thus, in trespass,

(a) *Leech v. Widsley, or Midgley*, 1 Vent. 54; 1 Lev. 283, S. C. [There is frequently some difficulty in determining in an action of trespass whether matter alleged constitutes merely matter of aggravation or a distinct substantive trespass. Decisions on this point are, *Monprivatt v. Smith*, 2 Campb. 175. *Bush v. Parker*, 1 Bing. N. C. 72. *Griffiths v. Dunnett*, 7 M. & G. 1002. *Meriton v. Coombes*, 9 C. B. 787. *Loweth v. Smith*, 12 M. & W. 582. *Worth v. Terrington*, 13 M. & W. 781. *Pratt v. Pratt*, 2 Ex. 413. *Polkinhorn v. Wright*, 8 Q. B. 197. *Davison v. Wilson*, 11 Q. B. 890. *Curlewis v. Laurie*, 12 Q. B. 640. *Noden v. Johnson*, 16 Q. B. 218. *Broughton v. Jackson*, 18 Q. B. 378.]

(b) *Porter v. Izat*, 1 Tyrw. & G. 639. *Smith v. Thomas*, 2 Bing. N. C. 378.

(c) *Porter v. Izat*, ubi supra.

(d) Com. Dig. Pleader, (G. 14). *Kinnersley v. Cooper*, Cro. Eliz. 168. *Carvick v. Blagrove*, 1 Brod. & Bing. 531. *Jones v. Roberts*, 4 Tyrw. 48. *Gledstane v. Hewitt*, 1 Crompt. & Jer. 565.

(e) Com. Dig. Pleader, (G. 10). *Read's case*, 6 Rep. 24. *Helyar's*

if the defendant pleads that *A.* was seised and demised to him, the plaintiff may traverse either the seisin or the demise.(*f*) Again, in trespass, the defendant pleads that *A.* was seised, and enfeoffed *B.*, who enfeoffed *C.*, who enfeoffed *D.*, whose estate the defendant hath ; — in this case the plaintiff may traverse which of the feoffments he pleases.(*g*)

The principle of this rule is sufficiently clear, for it is evident that where the case of any party is built upon several allegations, each of which is essential to its support, it is as effectually destroyed by the demolition of any one of these parts, as of another.

It is also laid down,

2. *That a traverse must not be too large, nor on the other hand too narrow.*(*h*)

* As a traverse must not be taken on an im- [*279] material allegation, so when applied to an allegation that is material, it ought in general to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be too *large* ; if less, too *narrow*.

A traverse may be too large by involving in the issue, — quantity, time, place or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause. Thus, in an action of debt on a bond conditioned for the payment of £1550, the defendant pleaded that part of the sum

case, 6 Rep. 24, b.; Doct. Pl. 354, 365. *Baker v. Blackman*, Cro. Jac. 682. *Young v. Rudd*, Carth. 347. *Young v. Rudd*, Salk. 627; Bac. Ab. Pleas, &c. (H. 5) p. 392, 5th edit. *Heydon v. Thompson*, 1 A. & E. 223. *Learmonth v. Grandine*, 4 M. & W. 658.

(*f*) Com. Dig. Pleader, (G. 10). *Moor v. Pudsey*, Hardr. 317.

(*g*) Doct. Pl. 365.

(*h*) 1 Saund. 268, n. (1), 269, n. (2); Com. Dig. Pleader, (G. 15), (G. 16). *Marshall v. Whiteside*, 1 Tyr. & G. 485.

mentioned in the condition, to wit, £1500, was won by gaming, contrary to the statute in such case made and provided; and that the bond was consequently void. The plaintiff replied that the bond was given for a just debt, and traversed that the £1500 was won by gaming, in manner and form as alleged. On demurrer it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of £1500 was won by gaming; whereas the statute avoids the bond, if *any part* of the consideration be on that account. The court was of opinion that there was no colour to maintain the replication; for that the material part of the plea was, that *part* of the money, for which the bond was given, was won by gaming; and [*280] that *the words “to wit, £1500,” were only form, of which the replication ought not to have taken any notice.⁽ⁱ⁾ So where the condition of a bond was that the obligor should serve the obligee half a year, and in an action of debt on the bond, the defendant pleaded that he had served him half a year at *D.*, in the county of *K.*, and the plaintiff replied, that he had not served him half a year *at D. in the county of K.*; this was adjudged to be a bad traverse, as involving the *place* — which was immaterial.^(k) So, where the plaintiff pleaded that the Queen, at a manor court held on such a day, by *I. S.*, her steward, and by copy of court roll, &c., granted certain land to the plaintiff's lessor, — and the defendant rejoined, traversing that the Queen, at a manor court held such a day, by *I. S.*, her steward, granted the land to the lessor, — the court held that the traverse was ill, — “for the jury are

(i) *Colborne v. Stockdale*, Str. 493; 8 Mod. 58, S. C.

(k) Doct. Pl. 860.

thereby bound to find a copy on such a day, and by such a steward; which ought not to be." The traverse, it seems, ought to have been, that the Queen did not grant *in manner and form as alleged*,^(l)— words which (as already observed) ^(m) bring into issue only the *substance* of the allegation.

* Again: a traverse may be too large, by [*281] being taken in the *conjunctive*, instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively. Thus, in an action of *assumpsit*, the plaintiff declared on a policy of insurance, and averred, "that the ship insured did not arrive in safety; but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed in the said voyage." The defendant pleaded with a *traverse*, "Without this, that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed in the voyage, in manner and form as alleged." Upon demurrer, this traverse was adjudged to be bad; and it was held that the defendant ought to have denied *disjunctively* that the ship, *or* tackle, &c. was sunk or destroyed;— because in this action for damages the plaintiff would be entitled to recover compensation for any part of that which was the subject of insurance, and had been lost: whereas (it was said), if issue had been taken in the *conjunctive* form, in which the plea was pleaded, "and the defendant should prove, that only a cable or anchor arrived in safety, he would be acquitted of the whole."⁽ⁿ⁾

(l) *Lane v. Alexander*, Yelv. 122.

(m) *Suprà*, * pp. 93, 94, 219, 220, n. (n).

(n) *Goram v. Sweeting*, 2 Saund. 205; acc. *Moore v. Boulcott*, 1 Bing. N. C. 323. *Stubbs v. Lainson*, 5 Dowl. 162; 1 M. & W. 728, S. C.

[*282] * On the other hand, however, *a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent*; — and such traverse will not be considered as too large.^(o) For example: in an action of replevin, the defendant avowed the taking of the cattle as damage feasant in the place in which, &c.; the same being the freehold of Sir *F. L.* To this the plaintiff pleaded, that he was seised in his demesne, as of fee, of *B.* close, adjoining to the place in which, &c.; that Sir *F. L.* was bound to repair the fence between *B.* close and the place in which, &c.; and that the cattle escaped, through a defect of that fence. The defendant traversed, that the plaintiff *was seised in his demesne, as of fee, of B. close*; and on demurrer the court was of opinion that it was a good traverse; for though a less estate than a seisin in fee would have been sufficient to sustain the plaintiff's case, yet as the plaintiff, who should best know what estate he had, had pleaded a seisin in fee, his adversary was entitled [*283] to traverse the * title so laid.^(p) Again; in an action of trespass, for trespasses committed in a close of pasture, containing eight acres, in the town of

[*282] See other instances of a traverse being too large, *Basan v. * Arrol*, 6 M. & W. 559; 8 Dowl. 356, S. C. *Thurman v. Wild*, 11 A. & E. 453. *De Medina v. Norman*, 9 M. & W. 820. [*Bradley v. Bardsley*, 14 M. & W. 873. *Jones v. Jones*, 16 M. & W. 699. *Tempest v. Kilner*, 2 C. B. 300. *Aldis v. Mason*, 11 C. B. 132.] As to traverses which have been held not too large, see *Wilkins v. Boutcher*, 2 Scott's N. R. 425; 1 Dowl. N. S. 478. *Palmer v. Gooden*, 8 M. & W. 890. [*Powell v. Bradbury*, 7 C. B. 201.]

^(o) Com. Dig. Pleader, (G. 16); *Sir Francis Leke's case*, Dyer, 365; 2 Saund. 207, n. (24). *Wood v. Budden*, Hob. 119. *Tatem v. Perient*, Yelv. 195. *Carvick v. Blagrove*, 1 Brod. & Bing. 531. *Palmer v. Ekins*, 2 Stra. 818, is apparently contra — but from the report of the same case, *Ld. Raym.* 1550, it may be reconciled with the other authorities.

^(p) *Sir Francis Leke's case*, Dyer, 365; 2 Saund. 208 a, n. (22).

Tollard Royal, the defendant pleaded, that *W.*, Earl of Salisbury, was seised in fee and of right of an ancient chase of deer, called Cranborn, and that the said chase did extend itself as well in and through the said eight acres of pasture, as in and through the said town of Tollard Royal: and justified the trespasses as committed in using the said chase. The plaintiff traversed *that the said chase extended itself as well to the eight acres, as to the whole town*; and issue being taken thereon, it was tried, and found for the plaintiff. It was then moved, in arrest of judgment, “that this issue and verdict were faulty;—because, if the chase did extend to the eight acres only, it was enough for the defendant; and therefore the finding of the jury, that it did not extend as well to the whole town, as to the eight acres, did not conclude against the defendant’s right in the eight acres,—which was only in question. But it was answered by the court, that there was no fault in the issue,—much less in the verdict (which was according to the issue); but the fault was in the defendant’s plea; for he puts in his plea more than he needed; viz. the whole town; which, being to his own disadvantage, and to the advantage of the plaintiff, there was no *reason for him to demur upon it; but [*284] rather to admit it, as he did, and so to put it in issue. And so judgment was given for the plaintiff.”(g)

Of a traverse too *narrow*, the following is an example. In an action of assumpsit brought for a compensation for the plaintiff’s service as a hired servant, the plaintiff alleged that he served from 21st March, 1647, to 1st November, 1664; the defendant pleaded that the plaintiff continued in the service till December, 1658, and then voluntarily quitted the service; *without this, that he*

(g) Wood v. Budden, Hob. 119.

served until the 1st November, 1664. This was a bad traverse; for as the plaintiff, in this action for damages, is entitled to compensation *pro tanto* for any period of service, it is obviously no answer to say that he did not serve the whole time alleged.^(s) So a traverse may be too narrow, by being applied to part only of an allegation, which the law considers as in its nature indivisible and entire; such as that of a prescription or grant. Thus, in an action of trespass for breaking and entering the plaintiff's close, called *S. C.*, and digging stones therein, the defendant pleaded that there are certain wastes lying open to one another — one, the close called *S. C.*, and the other called *S. G.*; and so pro-
[*285] ceeded to prescribe for the liberty * of digging stones in both closes, and justified the trespasses under that prescription. The replication traversed the prescriptive right in *S. C. only* — dropping *S. G.*; but the court held that the traverse could not be so confined, and must be taken on the whole prescription as laid.^(t)

SECTION III.

OF RULES WHICH TEND TO PRODUCE SINGLENESS OR UNITY IN THE
ISSUE.

The following rules enforce singleness in the method of pleading or allegation; and, by consequence, tend to produce a single issue.

(s) *Osborne v. Rogers*, 1 Saund. 267.

(t) *Morewood v. Wood*, 4 T. R. 157; and see Doct. Pl. 351, 352, 370. *Priddle and Napper's case*, 11 Rep. 10 b. *Bradburn v. Kennerdale*, Carth. 164; 1 Saund. 268, n. (1).

RULE I.

PLEADINGS MUST NOT BE DOUBLE. (*u*)

This rule applies both to the declaration and subsequent pleading. Its meaning with respect to the former, is that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is *sufficiently supported. With respect to the subsequent pleadings, the meaning is, that none of them is to contain several distinct answers to that which preceded it; and the reason of the rule in each case, is, that such pleading tends to several issues in respect of a single claim. (*v*)

The rule, it may be observed, in its terms, points to *doubleness* only; as if it prohibited only the use of *two* allegations, or answers, of this description; but its meaning, of course, equally extends to the case of more than two, — the term *doubleness*, or *duplicité*, being applied (though with some inaccuracy) to either case.

Of this rule, as applied to the *declaration*, the following is an example. The plaintiff declared in debt on a penal bill, (*w*) by which the defendant was to pay ten shillings on the 11th of June, and ten shillings upon the 10th of July next following, and ten shillings every three weeks after, till a certain total sum were satisfied

(*u*) Com. Dig. Pleader, (C. 33), (E. 2), (F. 16); Bac. Ab. Pleas, &c. (K.). *Humphreys v. Bethily*, 2 Vent. 198, 222; Doct. Pl. 135.

(*v*) La cause est pur ceo, que deux issues purroient estre pris sur les ples. Per Finchden, 40 Edw. III. 45; see also 15 Edw. IV. 1.

(*w*) *Bills penal* are instruments not now in use, having been superseded by *bonds with conditions*. The example in the text would therefore not occur in modern practice, but serves equally well the purpose of illustration.

by such several payments; and by the said bill the defendant bound himself for the true payment of the said several sums, in the penal sum of seven [*287] pounds; *and the plaintiff alleged that the defendant did not pay the said *total sum, or any part thereof, upon the several days aforesaid*, whereby an action had accrued to him, to demand the said penalty of seven pounds. This was held bad for duplicity. For if the defendant had failed in payment of *any one* of the sums, such failure would alone be a breach of the condition, and sufficient to entitle the plaintiff to the penalty he claimed, and the plaintiff ought therefore to have confined himself to the allegation of the non-payment of one of those sums only. (x) So, where the plaintiff declared in assumpsit, that the defendant was indebted to him in such a sum for nourishing one *E. L.* at the request of the defendant, which the latter promised to pay; and also, that the defendant promised to pay him so much as he reasonably deserved to have for nourishing the said *E. L.* during the same time, — this was bad for duplicity; and indeed also for repugnancy, (another fault in pleading, that will be hereafter considered,) as the two promises — to pay a sum certain, and to pay quantum meruit — were inconsistent, and could not stand together. (y)

(x) *Humphreys v. Bethily*, 2 Vent. 198, 222.

(y) *Hart v. Longfield*, 7 Mod. 148. As to duplicity in the *declaration*, see also *Cornwallis v. Savery*, 2 Burr. 773. *Manser's case*, 2 Rep. 4. *Galway v. Rose*, 6 M. & W. 291; 8 Dowl. 239, S. C. [In *Shepherd v. Shepherd*, 1 C. B. 849, the question of duplicity in a declaration was discussed. Maule, J., said (at p. 856): "A count is not bad because it contains two or more causes of action. . . . A declaration may, however, be bad for stating one cause of action twice over; for instance, stating two breaches before the statute 8 & 9 Will. III. c. 11. The same thing must not be asked for on two distinct grounds. In such a case, the declaration is not so much double as disputative."]

Of duplicity in *pleadings subsequent to the *decla- [*288] ration*, the following example occurs in a *plea in abatement*. The defendant pleaded, in disability of the person of the plaintiff, ten different outlawries adjudged against him, and it was held that the plea was ill for duplicity, because the plaintiff was disabled as well by one outlawry as by the whole ten. (z) The following is an instance of duplicity in a *plea in bar*. In trespass for breaking a close, and depasturing the herbage with cattle, if the defendant pleads that *A.* had a right of common, and *B.* also a right of common, in the close, and that the defendant, as their servant and by their command, entered and turned in the cattle in exercise of their rights of common, the plea is bad for duplicity, (a) because the title of either one or the other of the commoners, and the authority derived as his servant, would have *alone constituted a [*289]

(z) *Trevelian v. Seccomb*, Carth. 8. In the report of the case in Carthew, it seems to be supposed that duplicity is, in general, no objection to pleas in abatement; but this is not law. See *Bac. Ab. Abatement*, (P.). The mistake probably originated in a misapprehension of what is said by Lord Coke, *Co. Litt.* 304 a.; but what he says evidently applies, not to duplicity, in its proper sense, but to the use of several dilatory pleas, *successively in their proper order*, which, as will be hereafter seen, see Sect. VII. Rule III., the rules of pleading allow. [In *Esdale v. Lund*, 12 M. & W. 607, it was pleaded in abatement that several other writs were pending for the same cause of action. This was held bad for duplicity.]

(a) *Vin. Ab. tit. Double Pleas*, (A.) 114, cites 15 Hen. VII., 10. For other instances of duplicity in a plea, see *Faulkner v. Chevell*, 5 A. & E. 213. *Smith v. Dixon*, 7 A. & E. 1. *Stephens v. Underwood*, 4 Bing. N. C. 655. *Deacon v. Stodhart*, 5 B. N. C. 594. *Rawlinson v. Shand*, 5 M. & W. 468. *Eyre v. Shelley*, 6 M. & W. 269; 8 Dowl. 185. *S. C.* *Williams v. Jones*, 1 G. & D. 649. *Butcher v. Stewart*, 1 Dowl. N. S. 620; 9 M. & W. 405. *S. C.* *Pussford v. Peek*, 9 M. & W. 196. [*Die-trichsen v. Giubilei*, 14 M. & W. 845. *Harrold v. Whittaker*, 11 Q. B. 147. *Heseltine v. Siely*, 18 Q. B. 443. *Maillard v. Duke of Argyle*, 6 M. & G. 40. *Harrison v. Cotgreave*, 4 C. B. 562. For an instance of duplicity in a rejoinder, see *Kavanagh v. Gudge*, 5 M. & G. 726.]

sufficient answer to the declaration. Duplicity in the *replication* may be thus exemplified. The plaintiff declared in trespass, for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The defendant justified as servant to Sir *H. G.*, and pleaded that Sir *H. G.* was seised of a wall in his demesne as of fee, and because the beam was placed in the wall of the said Sir *H. G.* without his consent, the defendant, as his servant, in order to remove this nuisance, did enter the stable, and cut the beam as near to the wall as he could, doing as little damage as possible, and thereby the tiles were thrown down. The plaintiff replied, traversing that the wall was Sir *H. G.*'s; and then further pleaded that the defendant, of his own wrong, did throw down the tiles, for the cutting the beam as aforesaid. The court held, that the first traverse being a complete answer to the whole, the second made the replication double. (b)

The object of this rule being to enforce a single issue upon a *single subject of claim*, admitting of several issues, where the claims are *distinct*, (c) the rule is [*290] accordingly carried no further than *this in its application. The *declaration* therefore may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each. Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute for the case of an action in debt, on a penal bill, for the penalty accrued in consequence of non-payment of a sum by

(b) *Humphreys v. Churchman*, Rep. temp. Hard. 239. See also *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36, S. C., and *Hulme v. Muggleston*, 8 M. & W. 30. *Brooks v. Stuart*, 9 A. & E. 854; 1 P. & D. 615, S. C.

(c) *Supra*, *p. 143.

several instalments, — the case of an action of covenant, on a covenant to pay that sum by similar instalments. In this latter case the plaintiff might, without duplicity, declare that the defendant “did not pay the said total sum, or any part thereof, upon the several days aforesaid.” For he does not, as in the action upon the penal bill, found upon such non-payments a single claim, viz. the claim to the penalty of seven pounds; there being no penalty in question, his claims are multiplied in proportion to the number of non-payments; that is, he is entitled to ten shillings in respect of the first default, and ten shillings more upon each of the rest; the allegation of several defaults is, therefore, in this case, the allegation of so many distinct demands, and consequently allowable. (d) So the *plea*, though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of * claim or complaint. (e) Thus, in the pre- [*291] ceding example of duplicity in a plea in bar, if the case were a little varied, — and the defendant being charged with putting five beasts on the common, had pleaded that *A.* and *B.* had respectively rights of common there, and that he, as the servant of *A.*, put in two of the beasts, in respect of *his* common right, and as the servant of *B.*, put in three, in respect of *his* common right, — there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint, arising in respect of different cattle. (f) So in the *replication*,

(d) See *Bac. Ab. Pleas, &c.*, p. 446, 5th edit.

(e) *Com. Dig. Pleader*, (E. 2); *Co. Litt.* 304 a.

(f) *Vin. Ab. tit. Double Pleas*, (A.) 115.

and other subsequent parts of the series, a severance of pleading may take place in respect of several subjects of claim or complaint. Thus, if an action be brought for trespasses in closes *A.* and *B.*, and defendant pleads a single matter of defence applying to both closes, the plaintiff is still at liberty, in his replication, to give one answer as to so much of the plea as applies to close *A.*, and another answer as to so much of the plea as applies to close *B.* (*g*) The power, however, of alleging in a plea distinct matters, in answer to such [*292] parts of the declaration as relate *to different claims, seems to be subject to this restriction,—that neither of the matters so alleged be such as would alone be a sufficient answer to the whole. Thus, if an action be brought on two bonds, though the defendant may plead as to one, payment, and as to the other, duress, yet if he pleads as to one, a release of *all actions*, and as to the other, duress, it will be double, for the release is alone a sufficient answer to both bonds. (*h*)

Again, if there be *several defendants*, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper for his own defence, and they may either join in the same plea or sever, at their discretion. (*i*)

Where in respect of several subjects or several defendants a severance has thus taken place in the pleading, this may of course lead to a corresponding

(*g*) *Vivian v. Jenkins*, 3 Ad. & Ell. 741, and see *Johns v. Whitley*, 3 Wils. 132. [*Adams v. Andrews*, 15 Q. B. 284.]

(*h*) Doct. Pl. p. 136; Vin. Ab. tit. Double Pleas, (D.), and see *Burroughs v. Hodgson*, 9 A. & E. 499.

(*i*) Co. Litt. 303 a. *Essington v. Bourcher*, Hob. 245. It is said, however, arguendo, in the case cited, that they cannot sever in *dilatory* pleas. Sed qu.? See *Cuppledick v. Terwhit*, Hob. 250.

severance in the whole subsequent series; and (as the ultimate effect) to the production of *several issues*.

And where there are several issues, they * may [*293] respectively be decided in favour of different parties; and the judgment will follow the same division.

Such being in general the nature of duplicity, the following rules or points of remark will tend to its further illustration.

1. *A pleading will be double that contains several answers, whatever be the class or quality of the answer.* Thus, it will be double by containing several matters in abatement, or several matters in bar; (*k*) or by containing one matter in abatement and another in bar. (*l*) So a pleading will be double by containing several matters in confession and avoidance, or several answers by way of traverse; or by combining a traverse with a matter in confession and avoidance. (*m*)

2. *Matter may suffice to make a pleading double though it be ill pleaded.* Thus in trespass for assault and battery, the defendant pleaded that he committed the trespasses in the moderate correction of the plaintiff as his servant; and further pleaded, * that since [*294] that time the plaintiff had discharged and released to him the said trespasses, without alleging, as he ought to have done, a release *under seal*. The court held that this plea was double, the moderate correction and the release being each a matter of defence; and though the release was insufficiently pleaded, yet as it

(*k*) Com. Dig. Pleader, (E. 2); and see the cases already cited on the subject of duplicity.

(*l*) Semb. Com. Dig. Pleader, (E. 2). *Bleke v. Grove*, 1 Sid. 176.

(*m*) Com. Dig. Pleader, (E. 2); Bac. Ab. Pleas, &c. (K.), and see the cases already cited.

was a matter that a material issue might have been taken upon, it sufficed to make the plea double.(n)

On the other hand, it seems that,

3. *Matter immaterial cannot operate to make a pleading double.*(o) Thus, in an action by the executors of *J. G.* on a bond conditioned that the defendant should warrant to *J. G.* a certain meadow, the defendant pleaded that the said meadow was copyhold of a certain manor, and that there is a custom within the manor that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for [*295] the time being * may enter for forfeiture; and that the said *J. G.*, during his life, peaceably enjoyed the meadow; which descended after his death to one *B.*, his son and heir, who, of his own wrong, entered without the admission of the lord, against the custom of the manor; and because three shillings of rent were in arrear on such a day, the lord entered into the meadows as into lands forfeited. On demurrer it was objected, among other things, that the

(n) *Bac. Ab. Pleas, &c.* (K. 2). *Bleke v. Grove*, Sid. 175. *Stevens*, or *Stevenson v. Underwood*, 6 *Scott*, 402; 4 *Bing. N. C.* 655; 6 *Dowl.* 737, S. C. *Wright v. Watts*, 2 *G. & Dav.* 386.

(o) *Bac. Ab. Pleas, &c.* (K. 2); 1 *Hen. VII.* 16. *Countess of Northumberland's case*, 5 *Rep.* 98 a. *Case of the Executors of Grenelefe*, *Dyer*, 42 b.; *Doct. Pl.* 138. There is a dictum of *Doddridge, J.*, that a plea may be double, though only one of the matters be material, — *Calfe v. Nevil*, *Poph.* 186; but the weight of the authorities and the reason of the thing are opposed to this opinion. See however the remarks of the reporter in *Regil v. Green*, 2 *Gale*, 1, n, (c). [In *Wright v. Watts*, 3 *Q. B.* 89, *Patteson, J.*, said: "To make a plea double it is not necessary that both defences should be sustainable, but only that two should be set up." And similar statements were made by other judges. The language of the court in *Webster v. Watts*, 11 *Q. B.* 311, seems to indicate the same view. On the other hand, the decisions in *De Bernady v. Spalding*, 4 *Q. B.* 823, and *Palmer v. Gooden*, 8 *M. & W.* 890, seem explicable only on the more reasonable view that matter which does not constitute in substance a sufficient answer to the preceding pleading cannot make a pleading double.]

plea was double, because in showing the forfeiture to have accrued by the heir's own wrongful act two several matters are alleged:—first, that he entered without admission, against the custom; secondly, that three shillings of rent were in arrear. But the judges held, that the only sufficient cause of forfeiture was the non-payment of rent; that there being no custom alleged for forfeiture in respect of entry without admission, the averment of such entry was mere surplusage, and could not therefore avail to make the plea double. (*p*) It is, however, to be observed, that the plea seems to *rely* on the non-payment of the rent as the only ground of forfeiture; for it alleges, that “because three shillings of the rent were in arrear the lord entered,” and the court noticed this circumstance. The case, therefore, does not explicitly decide that where two several matters are not only pleaded, but *relied upon*, the immateriality of one of them shall *prevent [*296] duplicity; but the manner in which the judges express themselves seems to show that the doctrine goes to that extent; and there are other authorities the same way. (*q*)

This doctrine, that a plea may be rendered double by matter *ill pleaded*, but not by *immaterial* matter, quite accords with the *object* of the rule against duplicity, as formerly explained. (*r*) That object is the avoidance of several issues. Now whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over without taking the formal objection,—such matter tends to the production of a separate issue; and

(*p*) Case of the Executors of Grenellefs, Dyer, 42 b.

(*q*) Bac. Ab. Pleas, &c. (K. 2).

(*r*) Supra, *p. 279; and see also *pp. 142, 143.

is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it: it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

4. *No matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation.* (s). Thus it may be pleaded without du-
[*297] plicity, that after the cause of action *accrued, the plaintiff (a woman) took husband, and that the husband afterwards released the defendant; for though the coverture is itself a defence, as well as the release, yet the averment of the coverture is a necessary introduction to that of the release. (t) This exception to the general rule is prescribed by an evident principle of justice; for the party has a right to rely on any single matter that he pleases in preference to another, — as in this instance, on the release in preference to the coverture; but if a necessary inducement to the matter on which he relies, when itself amounting to a defence, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only.

5. *No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point.* (u) Thus to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may

(s) Bac. Ab. Pleas, &c. (K. 2); Com. Dig. Pleader, (E. 2); 24 E. 3, 75 b. *Calfe v. Nevil*, Poph. 185. See also *Rowles v. Lusty*, 4 Bing. 428. [*Lazarus v. Cowie*, 3 Q. B. 459.]

(t) Bac. Ab. Pleas, &c. (K. 2).

(u) Vin. Ab. Double Pleas, (A. 7), cites 2 Ed. IV. 8. *Robinson v. Rayley*, 1 Burr. 816. *Brogden v. Marriott*, 2 Bing. N. C. 473. *Webb v. Weatherby*, 1 Bing. N. C. 502.

set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest; for all of them taken together do but amount to *one connected cause of sus- [*298] picion.(v) This qualification of the rule against duplicity, applies not only to pleadings in confession and avoidance, but to traverses also; so that a man may deny as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close, and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff, in the replication, traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle." On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient by itself; but the court held that the point of the defence was, that the cattle in question were entitled to common;—that this *point* was single, though it involved the *three several facts* that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle;—that the replication traversing these facts, in effect therefore only brought in issue the single point—whether the *cattle were en- [*299] titled to common—and was consequently not open to the objection of duplicity.(w) The most fre-

(v) Vin. Ab. Double Pleas, (A. 7), cites 2 Ed. IV. 8. Brogden v. Marriott, 2 Bing. N. C. 473. Webb v. Weatherby, 1 Bing. N. C. 502. Palmer v. Gooden, 8 M. & W. 890; 1 Dowl. N. S. 673, S. C.

(w) Robinson v. Rayley, 1 Burr. 816.

quent instance of this cumulative traverse, as it may be called, occurs in the case of the replication *de injuriâ absque tali causâ*. This replication, it will be recollected, alleges that the defendant did the act (the subject of complaint) of his own wrong and “*without the cause alleged* ;” and this *cause* frequently consists of several connected circumstances, of which the example formerly given (*x*) may serve as an illustration. Another example is afforded by the following more recent case. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader and indebted to him in 100%, became bankrupt, whereupon the defendant sued out the commission. The plaintiff replied *de injuriâ absque tali causâ*. Upon demurrer it was objected that by this form of replication it was attempted to put in issue three distinct facts—the trading, the petitioning creditor’s debt, and the act of bankruptcy: but it was adjudged that these facts together constituted but one proposition, viz. that the plaintiff duly became bankrupt, and that the replication was therefore [*300] good. (*y*) *It is however, as was formerly stated, (*z*) a restriction in the use of this replication, that it cannot be applied so as to include in

(*x*) Suprà, *pp. 190, 191.

(*y*) O’Brien v. Saxon, 2 Barn. & Cress. 908; and see another example in Phillips v. Howgate, 5 Barn. & Ald. 220, a case which proves that upon this replication the defendant must prove the *whole* of the cause [*300] alleged in his plea, so far as material to the defence, but not *such circumstances of it as are immaterial; see also Selby v. Bardons, 3 Barn. & Ad. 2. Kerbey v. Denbey, 1 Tyrw. & G. 688; 1 M. & W. 336, S. C. Norman v. Westcombe, 2 M. & W. 349. Oakes v. Wood, 2 M. & W. 791. Monks v. Dikes, 4 M. & W. 567. Shearm v. Burnard, 10 A. & E. 593. Wilson v. Lewis, 2 M. & G. 197. Davis v. Chapman, 9 Dowl. 645; 2 M. & G. 921, S. C.

(*z*) Suprà, *p. 192.

the traverse any matter alleged on the other side, in the nature of *title or interest* in the land, &c., or the *commandment*, or *authority*, of the plaintiff, or any matter of record. If, therefore, any such matter be contained in the plea, and the plaintiff wishes to deny it, such matter must be traversed separately; or if he chooses not to point the denial to this, but to other matters in the plea, these other matters must separately form the subject of traverse. In the former case the denial is in the words of the allegation; in the latter, the pleading may be with an admission of part of the matter alleged, and a traverse *de injuriâ absque residuo causæ*, (a) thus:—
 “the said plaintiff says, that although true it is that the said defendant is seised, &c. For replication, nevertheless, in this behalf the said plaintiff says, that the said defendant, of his own wrong, and *without the residue of the cause* in his said plea alleged, broke and entered the said close, &c.” (b) It is to be observed, that *this restriction by which matter of *title* [*301] *or interest, commandment, authority from the adverse party, or record*, is required to be separately traversed, is not to be taken as applicable merely to the use of the replication *de injuriâ*, but extends, it is conceived, in its principle, to *all* cases of cumulative traverse; so that it may be said to be generally true that where any such matter is alleged in connection with

(a) Per Denison, J., *Robinson v. Rayley*, 1 Burr. 320.

(b) See the precedents, 9 Went. 327; 3 Chitty, 1129. *Lucas v. Nockells*, 2 You. & Jer. 304. *Kerbey v. Denbey*, 1 Tyrw. & G. 688; *1 M. & W. 336, S. C. *Merry v. Chapman*, 10 A. & E. 516; [*301] 8 P. & D. 25, S. C. N. B. The course formerly was to introduce the traverse *absque residuo causæ* with a *protestation*, thus, “*protesting* that the said defendant is not seised, &c. For replication, nevertheless, &c.” But the use of a *protestation* being now abolished by the rule Hil. 4 Will. IV., an *admission* will in future, perhaps, be, in general, adopted according to the form given in the text.

other circumstances, it is not a case in which it is competent to the other party to traverse cumulatively; (c) and that if he include all these circumstances in the same traverse, his pleading will be double. (cc)

The rule against duplicity in pleading being now explained, (d) it is necessary in the next place to advert to certain *modes of practice*, by which the effect of that rule is materially qualified. These are the use of *several counts*, and the allowance of *several pleas*; the former being grounded on ancient practice, the latter on the stat. 4 Anne, c. 16.

First shall be considered the subject of *several counts*.

[*302] * Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same suit, subject to certain rules which

(c) See Bul. Ni. Pri. 93.

[(cc) It should be observed that the allowance of cumulative traverses (other than *de injuriâ*, for the use of which special boundaries were fixed) is destructive of the fundamental aim of common law pleading—that of bringing the parties to issue on a single narrow point. *Robinson v. Raley*, 1 Burr. 316, is the leading case for the allowance of such traverses, and the distinction there laid down by Lord Mansfield is “that you must take issue upon a single point; but it is not necessary that this single point should consist only of a single fact. Here the point is, the cattle being entitled to common; this is the single point of the defence.” But any good affirmative plea contains but a single point of defence. If it contains more it is double, and the only logical consequence of *Robinson v. Raley* is that all the material facts of a preceding pleading may always be traversed together. This consequence was never admitted, nor was *Robinson v. Raley* overruled, but though followed in some recent cases, *Bell v. Tuckett*, 3 M. & G. 785; *Giles v. Giles*, 9 Q. B. 164; *Bennison v. Thelwell*, 7 M. & W. 512; *Eden v. Turtle*, 10 M. & W. 635; *Washbourn v. Burrows*, 1 Ex. 107; it was not followed in others, and though distinctions were attempted, the cases in fact seem indistinguishable. *DeWolf v. Bevan*, 13 M. & W. 160; 2 Dowl. & L. 345, S. C. *Bonzi v. Stewart*, 7 M. & G. 746.]

(d) See Appendix, Note 45.

the law prescribes as to joining such demands only as are of similar quality or character. (e) Thus, he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So if several distinct trespasses have been committed, these may all form the subject of one declaration in trespass; but, on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond, and a complaint of trespass; these being dissimilar in kind. (f) Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declaration; and are known in pleading by the description of *several counts*. (g)

In order to give the unlearned reader an exact idea of the nature of several counts, it may be useful to lay before him an example.

If the plaintiff has to complain of several assaults, he may thus frame his declaration:—

*DECLARATION IN TRESPASS.

[*303]

For an Assault and Battery.

In the Queen's Bench.

The — day of —, in the year of
our Lord —.

— to wit, *A. B.* (the plaintiff in this suit,) by *E. F.* his attorney, complains of *C. D.* (the defendant in this suit,) who has been summoned to answer the plaintiff in an action of trespass: *For that* the defendant heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, made an assault upon the plaintiff, and beat, wounded and ill-treated him, so that his life was despaired of. *And also for that* the defendant heretofore, to wit, on the day and year aforesaid, with force and arms,

(e) Upon this subject, see *Bac. Ab. Actions*, (C.).

(f) See Appendix, NOTE 46. [Nor can counts in *assumpsit* be joined with counts in trespass on the case. *Courtenay v. Earle*, 10 C. B. 73.]

(g) *Ibid.* NOTE 47.

made another assault upon the plaintiff, and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him then did, against the peace of our said Lady the Queen, and to the damage of the plaintiff of — pounds; and therefore he brings his suit, &c. (*h*)

When several counts are thus used the defendant may, according to the nature of his defence, demur to the whole, or plead a single plea applying to the whole; (*hh*) or may demur to one count, and plead to another, or plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But whether one or more [*304] issues be produced, if the decision, whether *in law or fact, be in the plaintiff's favour as to any one or more counts, he is entitled to judgment pro tanto though he fail as to the remainder. (*i*)

It is to be observed that several causes of action do not always form the subject of several counts, but are sometimes thrown, for the sake of brevity and convenience, into one; and in the actions of debt and assumpsit the claims of most frequent occurrence, viz. those for *goods sold*, for *work done*, for *money lent*, for *money paid*, for *money received to the use of the plaintiff*, for *money due on an account stated*, are always condensed (when they occur in the same action) under the allegation of a single promise, pursuant to a form lately promulgated by rule of court. (*k*)

(*h*) See the declaration, with a count for *one* assault and battery only, *suprà*, *p. 39.

[*hh*] A single plea to several counts if bad as to any of them is wholly bad. *Hartley v. Manton*, 5 Q. B. 247. *Phillips v. Claggett*, 10 M. & W. 102.]

(*i*) See *Phillips v. Howgate*, 5 Barn. & Ald. 220.

(*k*) Reg. Hil. T. 2 Will. IV. N. B. Though this form contains only *one promise*, it is considered as constituting *several counts*. See *Ferguson*

The next subject for consideration is that of *several pleas*.

It has been already stated, that the rule against duplicity does not prevent a defendant from giving distinct answers to different claims or complaints on the part of the plaintiff. (*l*) To several counts, * or to distinct parts of the same count, he may [*305] therefore plead several pleas, viz. one to each. (*m*) Thus, in an action of trespass for two assaults and batteries, he may plead, as to the first count, not guilty, and, as to the second, the Statute of Limitations, viz. that he was not guilty within four years; and the following is an example of the form in which this may be done : —

PLEAS.

In Trespass for Assault and Battery. (n)

And the defendant, by — his attorney, *as to the first count* of the declaration, says that he is not guilty of the trespasses therein mentioned, or any part thereof, in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country. And *as to the second count* of the declaration, the defendant says, that he was not, at any time within four years next before the commencement of this suit, guilty of the trespasses in the said second count mentioned, or any part thereof, in manner and form as the plaintiff hath above complained. Wherefore the defendant prays judgment if the plaintiff ought to maintain his aforesaid action thereof against the defendant.

Nor is the defendant in pleading different pleas to different parts of the declaration, confined to

v. Mitchell, 4 Dowl. 513; 1 Tyr. & Gr. 179, S. C. *Jourdain v. Johnson*, 5 Tyrw. 524; 4 Dowl. 534, S. C; Reg. H. 4 Will. IV.

(*l*) *Suprà*, * p. 290.

(*m*) Or he may plead to one count and demur to another. See *post*, Rule II.

(*n*) See the declaration, *suprà*, * p. 303.

[*306] * pleas of the *same kind*. Thus, it is laid down, that he may plead in abatement to part, and in bar to the residue. (*o*)

• But it may also happen that a defendant may have several distinct answers to give to the *same* claim or complaint. Thus to an action of trespass for two assaults and batteries, he may have ground to deny both the trespasses, and also to allege that they were neither of them committed within four years. Anterior however to the regulation which will be presently mentioned, it was not competent to him to plead these several answers to both trespasses, as that would have been an infringement of the rule against duplicity. The defendant was therefore obliged to elect between his different defences, where more than one thus happened to present themselves, and to rely on that, which in point of law or fact he might deem most impregnable. But as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of several pleas to the same matter, after being for ages observed in its original severity, was at length considered as contrary to the true principles of justice, and was accordingly relaxed by legislative enactment. The

[*307] stat. 4 Anne, c. 16, s. 4, provides, that * “it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defence.” (*p*) Under this act the course is

(*o*) 2 Saund. 209 (*e*); and see *Herries v. Jameson*, 5 T. R. 558. *Hill v. White*, 6 Bing. N. C. 26; 8 Dowl. 13, S. C.

(*p*) In a court *not* of record several pleas cannot be pleaded, but all subsequent to the first are nullities, *Chitty v. Dendy*, 3 Ad. & Ell. 819.

for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so, and upon this a rule is accordingly drawn up for that purpose. (*q*) The form of pleading several pleas, where leave is thus granted, will appear by the following example:—

PLEAS.

In Trespass for Assault and Battery. (r)

And the defendant, by — his attorney, says, that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country. *And for a further plea* in this behalf, the defendant says, that he, the defendant, was not, at any time within four years next before the commencement * of this suit, guilty [*308] of the said trespasses in the declaration mentioned, or any part thereof, in manner and form as the plaintiff hath above complained. And this he is ready to verify.

When several pleas are pleaded either to different matters, as in * p. 305, or (by virtue of the statute of Anne) to the same matter, as in the last example, the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea, and reply to the other, or make a several replication to each plea; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But whether one or

The above statute does not extend to the crown, *Attorney-General v. Donaldson*, 7 M. & W. 422; 9 Dowl. 319, S. C.

(*q*) This rule is obtained on application to a single judge, (*Reg. Trin.*, 1 Will. IV.), and he has a discretion either to permit or refuse, according to the nature of the matters proposed to be pleaded. *Jenkins v. Edwards*, 5 T. R. 97.

(*r*) See the declaration, *suprà*, * p. 303.

more issues be produced, if the decision, whether in law or fact, be in the defendant's favour as to any one or more pleas, he is entitled to judgment, though he fail as to the remainder — i. e. he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates; and if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

The use of *several pleas* (though presumably intended by the statute to be allowed only in a case where there are really several grounds of defence), (*s*) is in practice sometimes carried further. For it [*309] was *soon found that when there was a matter of defence by way of special plea, it was generally expedient to plead that matter in company with the general issue, whether there were any real ground for denying the declaration or not; because the effect of this is to put the plaintiff to the proof of his declaration, or some material part of it, before it can become necessary for the defendant to establish his special plea; and thus the defendant has the chance of succeeding, not only on the strength of his own case, but by the failure of the plaintiff's proof. To this extent, therefore, is the use of several pleas now carried; and accordingly the form of pleading in the last of the above examples is in practice frequently adopted instead of that in the first, whether the truth of the case really warrants a denial of both counts or not. Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the statute. For that *leave of the court*, which the statute requires, was formerly often refused where the proposed subjects

(*s*) See Lord Clinton v. Morton, 2 Stra. 1000.

of plea appeared to be *inconsistent*; and on this ground leave has been refused to plead to the same trespass *not guilty*, and *accord* and *satisfaction*; or *non est factum*, and *payment* to the same demand.(*t*) But in modern practice, such pleas, notwithstanding the apparent repugnancy between them, are * permitted;(*u*) and [*310] the only pleas, perhaps, which have been uniformly disallowed on the mere ground of inconsistency, are those of the general issue and a *tender*.(*v*)

On the subject of several pleas it is to be further observed, that the statute of Anne extends to the case of pleas *only*, and not to *replications* or *subsequent pleadings*. These remain subject to the full operation of the common law against duplicity;(*w*) so that, though to each plea there may (as already stated) be a separate replication, yet there cannot be offered to the same plea, and in reference to the same matter of claim or complaint, more than a single replication, nor to the same replication more than one rejoinder, and so to the end of the series. The legislative provision allowing several matters of *plea*, was confined to that case, under the * impression, probably, that it was in that [*311] part of the pleading, that the hardship of the

(*t*) Com. Dig. Pleader, (E. 2).

(*u*) Vide 1 Sel. Prac. 299; 2 Chitty, 502, 1st edit. *Rama Chitty v. Hume*, 13 East, 255. *Wilkinson v. Sinall*, 3 Dowl. 564. *Triebnerr v. Duerr*, 1 Bing. N. C. 266. *Currie v. Almond*, 5 Bing. N. C. 224. *Temple v. Keily*, 9 Dowl. 62; 1 M. & G. 904, S. C. *Morse v. Apperley*, 6 M. & W. 145; 8 Dowl. 203, S. C. *Pym v. Grazebrook*, 1 Dowl. N. S. 489. *Bailey v. Cathrey*, 1 Dowl. N. S. 456.

(*v*) But the Court of C. P. refused to allow the defendant in *scire facias*, on a judgment, to plead, 1. Payment; 2. That the judgment was obtained by fraud; 3. That the warrant of attorney on which judgment was entered up was obtained by fraud. *Shaw v. Lord Alvanley*, 2 Bing. 325; see also *Serle v. Bradshaw*, 4 Tyr. 69. *Bastard v. Smith*, 5 A. & E. 827. *London & Brighton Railway Company v. Wilson*, 6 Bing. N. C. 185.

(*w*) *Suprà*, * p. 285.

rule against duplicity was most seriously and frequently felt; and that the multiplicity of issues which would be occasioned by a further extension of the enactment, would have been attended with expense and inconvenience more than equivalent to the advantage. The effect, however, of this state of law is somewhat remarkable; for example, it empowers a defendant to plead to a declaration in assumpsit for goods sold and delivered, 1. Non-assumpsit; 2. That the cause of action did not accrue within six years; 3. That he was an infant at the time of the contract. On the first plea the plaintiff has only to join issue: but with respect to each of the two last, he may have several answers to give. The case may be such as to afford either of these replications to the Statute of Limitations, viz. that the cause of action *did* accrue within six years, or that at the time the cause of action accrued, he was *beyond* sea, and that he commenced his suit within six years after his return. So to the plea of infancy, he may have ground for replying either that the defendant was *not* an infant, or that the goods for which the action is brought were *necessaries* suitable to the defendant's condition in life. Yet, though the defendant had the advantage of his three pleas cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to each plea.

[*312] * It is also to be observed, that the power of pleading several matters, extends to pleas in *bar* only, and not to those of the *dilatory* class; — with respect to which, the leave of the court will not be granted.(x)

Again, it is to be remarked that the statute does not

(x) See 1 Sell. Pract. 275.

operate as a total abrogation, even with respect to pleas in bar, of the rule against duplicity. For, in the first place it is necessary (as we have seen) to obtain *the leave of the court* to make use of several matters of defence. And each defence must besides be distinctly pleaded as a *new* or *further* plea; (y) so that notwithstanding the statute, and the leave of the court obtained in pursuance of it, to plead several matters, it would still be improper to incorporate several matters in *one plea*, in any case in which the plea would be thereby rendered double at common law.

By a very ancient relaxation of practice, the rule against duplicity had, to a considerable extent, been evaded, (where the pleader felt uncertain as to the true position of his case, either in point of fact, or in point of law,) by stating the same cause of action in various ways in the shape of several *counts, [*313] and the same matter of defence in various ways in the shape of several pleas. But by the recent Rule of Hil. T. 4, Will. IV., it is now provided that "several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas, or avowries, or cognisances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each." (z)

(y) It was formerly the practice also to state that such further plea was pleaded "*by leave of the court for this purpose first had and obtained.*" But this is now discontinued by Rule of court, Hil. Term, 4 Will. IV.

(z) See this rule at large, and the reasons on which it was founded, Appendix, NOTE 48. And see the decisions which have taken place upon it, Tidd's N. P. 216, et seq.; 406, et seq. *Cholmondeley v. Payne*, 3 Bing. N. C. 708. *Vaughan v. Glenn*, 5 M. & W. 577; 8 Dowl. 396, S. C. *James v. Bourne*, 4 Bing. N. C. 420. *Blyth v. Shepherd*, 9 M. & W. 763. [*Bleaden v. Rapallo*, 8 M. & G. 116. *Cahoon v. Burford*, 13 M. & W. 186. *Mathewson v. Ray*, 16 M. & W. 329. *Simpson v. Rand*, 1 Ex. 688.]

Such is the nature and extent of the rule against double pleading. Under this rule it remains only to observe, that if instead of demurring for duplicity, the opposite party passes the fault by, and pleads over, he is in that case bound to answer each matter alleged; and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement.(a)

[*314]

* RULE II.

IT IS NOT ALLOWABLE BOTH TO PLEAD AND TO DEMUR TO THE SAME MATTER. (c)

This rule depends on exactly the same principles as the last. As it is not allowable to *plead* double, lest several issues in fact in respect of the same matter should arise, so it is not permitted both to *plead and demur* to the same matter, lest an issue in fact and an issue in law, in respect of a single subject, should be produced. The party must, therefore, make his election.

The rule, however, it will be observed, only prohibits the pleading and demurring *to the same matter*. It does not forbid this course as applicable to *distinct statements*. Thus, a man may plead to one count, or one plea, and demur to another. (d) The reason of this

(a) *Bolton v. Cannon*, 1 Vent. 272. *Chitty v. Dendy*, 3 Ad. & Ell. 823. *Reynolds v. Blackburn*, 6 Dowl. 19; 7 A. & E. 161, S. C. *Eyre v. Shelly*, 8 Dowl. 185. *Pascoe v. Vyvyan*, 1 Dowl. N. S. 939. [And a pleading will not itself be bad for duplicity because it answers both statements of defence or avoidance in the preceding pleading. *Reynolds v. Blackburn*, *supra*. *Lane v. Ridley*, 10 Q. B. 479. *Kemp v. Watt*, 15 M. & W. 672.]

(c) Bac. Ab. Pleas, &c. (K. 1).

(d) So also he may demur to part of a plea and reply to the residue. *Hartshorne v. Watson*, 4 Bing. N. C. 178; 6 Dowl. 404, S. C.

distinction is sufficiently explained by the remarks already made on the subject of duplicity in pleading.

Lastly, it is to be remarked, that the statute of Anne, which authorises the pleading of *several pleas*, gives no authority for *demurring and pleading* to the same matter. The rule now in question, therefore, is not affected by that provision; but remains in the same state as at common law.

* SECTION IV.

[*315]

OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE.

The rules tending to certainty in the pleadings, and, by consequence, certainty in the issue, are very numerous, and in their nature do not easily admit of methodical arrangement; but an enumeration shall here be attempted of such of them as appear to be of principal importance.

RULE I.

THE PLEADINGS MUST HAVE CERTAINTY OF PLACE.(e).

It was formerly explained (f) that the nature of the trial by jury, while conducted in the form which first belonged to that institution, was such as to render particularity of *place* absolutely essential in all issues which a jury was to decide. Consisting, as the jurors formerly did, of witnesses, or persons in some measure cognisant of their own knowledge of the matter in dispute, they were of course, in general, to be summoned from the *particular place or neighbourhood [* 316]

(e) Com. Dig. Pleader, (C.20); Ibid. Abatement, (H.13); Co. Litt. 125 a.

(f) Vide *suprà*, * p. 146.

where the fact happened; (*g*) and in order to know into what county the *venire facias* for summoning them should issue, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighbourhood was. (*h*) Such place or neighbourhood was called *the venue* or *visne* (from *vicinetum*); (*i*) and the statement of it in the pleadings obtained the same name; — to allege the place being in the language of pleading, to *lay the venue*.

Until the change of system introduced by the late Rule of court, Hil. 4 Will. IV., it was accordingly the rule that every allegation in the pleadings, upon which issue could be taken, that is, every material and traversable allegation (supposing it to be in the affirmative form), should be *laid* with a *venue*; that is, should state the place at which the alleged fact happened. This venue was to consist (according to the more rigorous and ancient practice at least), not only of the [* 317] county, but * also of the parish, town, or hamlet in the county. (*k*) A venue was also laid in the *margin* of the declaration, at its commencement, by inserting there the name of the county in which the several facts mentioned in the body of the declaration, or

(*g*) Co. Litt. by Harg. 125 a., n. (1). “The *venire* was to bring up the *pares* of the place where the fact was laid in order to try the issue, and originally every fact was laid in the place where it was really done: — and therefore the written contracts bore date at a certain place.” Gilb. Hist. C. P. 84.

(*h*) *Ilderton v. Ilderton*, 2 H. Bl. 161; per Lord Mansfield, *Mostyn v. Fabrigas*, Cowp. 176; Co. Litt. 125 a., b.; see 2 Hen. VII. 4.

(*i*) Bac. Abr. *Visne* or *Venue*, (A.); 3 Bla. Com. 294.

(*k*) Co. Litt. 125 a.; Com. Dig. *Abatement*, (H.18); *Ibid.* *Pleading*, (C. 20). *Braddish v. Bishop*, Cro. Eliz. 269. *Amory v. Brodrick*, 4 Barn. & Ald. 712. *Ware v. Boydell*, 3 M. & S. 148.

some principal part of them, occurred. (l) The venue so laid in the margin was called the *venue in the action*, and the action was said to be *laid*, or brought *within that county*; because it was always the same county as that into which the original writ had issued at the commencement of the suit, and because the action was always tried by a jury of that county, unless a new and different venue happened to be laid in the subsequent pleadings.

Though the original object of thus laying a venue was to determine the place from which the *venire facias* should direct the jurors to be summoned, in case the parties should put themselves upon the country, that practice had nevertheless, so far as regarded the laying of a venue in the *body* of the pleadings, become an unmeaning form, the venue in the *margin* having been long found sufficient for all practical purposes. It may be convenient to explain here by what process this change took place.

* The most ancient practice, as established at [* 318] the period when juries were composed of persons cognisant of their own knowledge of the fact in dispute, was of course to summon the jury from that venue which had been laid to the particular fact *in issue*; and from the venue of *parish, town, or hamlet*, as well as county. (m) Thus, in an action of debt on bond, if the declaration alleged the contract to have been made at Westminster, in the county of Middlesex, and the defendant in his plea denied the bond, issue being joined on this plea, it would be tried by a jury from

(l) See *The King v. Burdett*, 4 B. & Ald. 175, 176; *Calvin's case*, 7 Rep. 1. *Scott v. Brest*, 2 T. R. 238.

(m) Co. Litt. 125 a.; Bac. Abr. *Visne of Venue*, (E). And see an illustrative case, 43 Edw. III. 1.

Westminster. Again, if he pleaded an affirmative matter, as, for example, a release, he would lay this new traversable allegation with a venue; and if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea,—such issue would be tried by a jury from Oxford, and not from Westminster. (n) And it may here be incidentally observed, that as the place or neighbourhood in which the fact arose, and also the allegation of that place in the pleadings, was called the *venue*,—so the same term was often applied to the jury summoned from thence. Thus it

would be said in the case last supposed, that
[*319] * *the venue was to come from Oxford*. With re-

spect to the *form* of the venire at this period, it was as follows:—*venire facias duodecim liberos et legales homines, de vicineto de W. (or O.), (i. e. the parish, town, or hamlet,) per quos rei veritas melius sciri poterit, &c. (o)*

While such appears to have been the most ancient state of practice, (p) it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and instead of being cognisant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighbourhood ceased to apply, and it was considered as sufficient if,

(n) *Craft v. Boite*, 1 Saund. 246 b.; Com. Dig. Action, (N. 12); 8 Edw. III. 8 Pl. 20; 45 Edw. III. 16; 3 Reeves, 410.

(o) *De vicineto tali* (is the expression of Bracton) *per quos rei veritas melius sciri poterit, &c.* Bract. 309 b., 310 a., 396 b., 397 a. In the statute 27 Eliz. c. 6, s. 1, the form is—*12 liberos et legales homines de vicineto de B., per quos rei veritas, &c.* And see Litt. sect. 234.

(p) See Appendix, NOTE 49.

by way of partial conformity with the original principle, a *certain number of the jury* came from the same *hundred* in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue, nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its *form*, which still directed the sheriff, as in former times, * to summon the whole jury from the particular venue. (*q*) The number of hundredors which it was necessary to summon, was different at different periods: in later times, no more than *two* hundredors were required in a personal action. (*r*)

In this state of the law, was passed the statute 16 and 17 Car. II. c. 8. By this act (which is one of the statute of jeofails) it is provided, "that after verdict, judgment shall not be stayed or reversed, for that there is no right venue — so as the cause were tried by a jury of the proper county or place *where the action is laid*." This provision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that *in the action*, but where the venire had improperly directed a jury to be summoned from the *venue in the action*, instead of the venue *laid to the fact in issue*. (*s*) This had formerly been matter of *error*, and therefore ground for arresting or reversing the judgment; (*t*) but by this act (passed with a view of removing what had become a merely formal objection), the error was cured, and the staying

(*q*) 27 Eliz. c. 6, s. 1; Litt. sect. 234.

(*r*) 27 Eliz. c. 6, s. 5. See Appendix, NOTE 50.

(*s*) Craft v. Boite, 1 Saund. 247.

(*t*) 1 Saund. 247, n. (1); 2 Saund. 5, n. (3); Bowyer's case, Cro. Eliz. 468; Eden's case, 6 Rep. 15 b.; Co. Litt. by Harg. 125 a., n. (1).

or reversal of the judgment disallowed. While [* 321] such was its direct operation, it * has had a further effect, not contemplated perhaps by those who devised the enactment. For, what the statute only purported to cure as an error, it virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that *in the action* were afterwards constantly tried, not by a jury of the venue laid to the *fact in issue*, but by a jury of the *venue in the action*. (u)

Another change was introduced by the statute 4 Anne, c. 16, sect. 6. This act provides, that "every venire facias for the trial of any issue, shall be awarded of the *body* of the proper county where such issue is triable," instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. From this time, therefore, the form of the venire has been changed; and directs the sheriff to summon twelve good and lawful men, &c. "from the body of his county;" (v) and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for venue is situate. (w)

[* 322] * It thus appears, that by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the *fact in issue*, and from the venue

(u) 2 Saund. 5, n. (3).

(v) See the form of the venire, *suprà*, * pp. 85, 86.

(w) And even in criminal proceedings it is now expressly enacted, that no jurors shall be required to be returned from any hundred or hundreds, or from any particular venue within the county; and that [* 322] * the want of hundredors shall be no cause of challenge; 6 Geo. IV. c. 50, sect. 13.

of *parish, town, or hamlet*, as well as county, directed them in all cases to be summoned from the *body of the county in which the action is laid*, whether that be the county laid to the fact in issue or not, and without regard to the parish, town, or hamlet.

In this altered state of things it is evident that there was no longer any real utility in the practice of laying a venue to each traversable fact in the body of the pleadings. This practice, however, continued to be observed until the making of the *Regula Generalis* of Hil. T. 4 W. IV., above mentioned. But by that rule it is provided, that in "future the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration or in any subsequent pleading." (x)

* On the whole then the rule of pleading [* 323] as to the necessity of laying venue, is now reduced to this, — that the venue in the action, that is, the county in which the action is intended to be tried, and from the body of which the jurors are accordingly to be summoned, must be stated in the margin of the declaration; and that in the few cases in which the proceeding is still by original writ, this must be the same county into which the original writ issued.

There is, however, another very important point still remaining to be considered, viz. how far it is necessary to lay the venue *truly*.

Before the change in the constitution of juries above-

(x) This rule was recommended by the Common Law Commissioners. See their Second Report, p. 33. The improper insertion of venue is, however, no ground for setting aside the declaration, nor for demurrer, but application should be made to a judge at chambers to strike it out. *Farmer v. Champneys*, 4 Tyrw. 859; 1 C., M. & R. 369, S. C. *Townsend v. Gurney*, 5 Tyrw. 214; 1 C., M. & R. 590, S. C.

mentioned, the venue was of course always to be laid in the true place where the fact arose, for so the reason of the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognised between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the *really*, and hardly any others; the latter consisted of such facts [*324] as might be supposed *to have happened anywhere, and therefore comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former, it was held, that if any local fact were laid in pleading, at a certain place, and issue was taken on that fact, the place formed part of the substance of the issue, and must therefore be proved as laid, or the party would fail as for want of proof. But as to transitory facts the rule was, that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another. (y)

The late rule of Hil. T., 4 Will. IV., having abolished the allegation of venue, except as it regards the county in the margin of the declaration (or venue in the action), the present state of the law, with respect to the necessity of laying the true venue, is accordingly as follows:—

Actions are either *local* or *transitory*. An action is local, if all the principal facts on which it is founded

(y) Vin. Ab. Trial, (M. f.); Co. Litt. 282 a. See Appendix, NOTE 51.

be local ; and transitory, if any principal fact be of the transitory kind. (z) In a local action the plaintiff must lay the venue in the *action truly. [*325] In a transitory one, he may lay it in any county that he pleases.

From this state of the law, it follows, first, that if an action be local, and the facts arose *out of the realm*, such action cannot be maintained in the English courts ; (a) for as the venue in the action is to be laid truly, there is no county which, consistently with that rule, can be laid in the margin of the declaration. But, on the other hand, if the action be transitory, then, though all the facts arose abroad, the action may be maintained in this country, because the venue in the action may be laid in any English county, at the option of the plaintiff.

The same state of law also leads to the following inference, that in a transitory action, the plaintiff may have the action tried in any county that he pleases ; for (as we have seen) he may lay the venue in the action in any county, and upon issue joined, the venire issues into the county where the venue in the action is laid. And such, accordingly, is the rule, subject only to a check interposed by another regulation, viz. that which relates to the *changing of the venue*. The courts established about the reign (as it is said) of *James I. (b) a practice by which defendants [*326] were enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforced, if they

(z) As to the cases in which transitory, and in which local, see 1 Chit. 268, et seq. 6th edit. *Buckworth v. Simpson*, 5 Tyrw. 344 ; 1 C., M. & R. 834, S. C.

(a) Per Buller, J., *Doulson v. Matthews*, 4 T. R. 503.

(b) *Knight v. Farnaby*, 2 Salk. 670.

pleased, a compliance with the stricter and more ancient system. (c) By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed*, i. e., altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application, and oblige the plaintiff to amend his declaration in this particular; unless he, on the other hand, will undertake to give at the trial some material evidence arising in the county where the venue was laid.

Hitherto the rule as to alleging place in the pleadings, has been considered exclusively in reference to the ancient and nearly extinguished learning of *venue*. But it is to be observed, that in some cases, place is alleged in pleading, without reference to the object of determining from whence the jurors are to come, and merely to give a reasonable certainty and clearness to the general statement of facts. Thus, where [*327] the * plaintiff complains of a trespass to his close, or the defendant claims a right of way over the plaintiff's close from one terminus to another, the declaration, for greater certainty, states the name of the close and of the parish and county where it is situate, and the plea sets forth the termini of the way.

The allegation of place in such cases was always necessary in point of due particularity, and as matter of local description; and it still continues to be so, notwithstanding the rule of court above cited, dispensing with *venue* in the body of the pleadings. For that rule contains an express proviso, "that in cases where local

(c) See Appendix, NOTE 52.

description is now required, such local description shall be given.”(*d*)

It remains only to add, that where place is alleged as matter of *description*, and not as venue, it must, in all cases, be stated truly and according to the fact, under peril of variance, if the matter should be brought into issue.

*RULE II.

[*328]

THE PLEADINGS MUST HAVE CERTAINTY OF TIME.(*e*)

In personal actions, the pleadings must allege the *time*, that is, the day, month, and year when each traversable fact occurred ; and when there is occasion to mention a continuous act, the period of its duration ought to be shown.(*f*)

The necessity of laying a time extends to *traversable* facts only, and, therefore, no time needs be alleged to matter of inducement or aggravation.(*g*)

The time is considered in general as forming no material part of the issue ; so that one time may be alleged and another proved.(*h*) The pleader, therefore, assigns any time that he pleases, to a given fact. This option, however, is subject to certain restrictions ;

1. He should lay the time * under a *videlicet*, [*329]

(*d*) As to what is a sufficient description of a close in an action of trespass, q. c. f., see *Brownlow v. Tomlinson*, 1 M. & G. 484.

(*e*) Com. Dig. Pleader, (C. 19). *Halsey v. Carpenter*, Cro. Jac. 359. *Denison v. Richardson*, 14 East. 291. *Ring v. Roxbrough*, 2 Tyr. 473. *Ferguson v. Mitchell*, 1 Tyr. & G. 179. *Spyer v. Thelwell*, 4 Dowl. 509. *Lane v. Thelwell*, 1 Tyr. & G. 352.

(*f*) *Ibid*.

(*g*) Per Buller, J., *The King v. Holland*, 5 T. R. 620. See also *Webb v. Baker*, 7 A. & E. 841.

(*h*) Co. Litt. 283 a. *The King v. Bishop of Chester*, 2 Salk. 561. *Cooke v. Birt*, 5 Taunt. 765. *Arnold v. Arnold*, 3 Bing. N. C. 81.

(with the prior intervention of the words "to wit," or "that is to say,") if he does not wish to be held to prove it strictly; (i) 2. He should not lay a time that is *intrinsically impossible, or inconsistent with the fact to which it relates*. A time so laid would, in general, be sufficient ground for demurrer. (k) But, on the other hand, there is no ground for demurrer where such time is laid to a fact not traversable, or where, for any other reason, the allegation of time was unnecessarily made; for an unnecessary statement of time, though impossible or inconsistent, will do no harm, upon the principle that *utile per inutile non vitiatur*; (l) 3. Again, there are some instances in which time happens to form *a material point in the merits of the case*; and in these instances, if a traverse be taken, the time laid is [*330] of the substance * of the issue, and must be strictly proved; (m) just as in statements of local description it is necessary to prove the alleged place. The pleader, therefore, with respect to all facts

(i) As to the meaning and effect of a *videlicet*, vide 1 Chitty, 317, 6th edit. Simmons v. Knox, 3 T. R. 68. Arnfield v. Bate, 3 M. & S. 173; 2 Wms. Saund. 291 (c). Bray v. Trueman, 2 J. B. Moore, 114. Corporation of Arundel v. Bowman, *ibid.* 93. Crispin v. Williamson, 8 Taunt. 107. Draper v. Garatt, 2 Barn. & Cress. 2. Edge v. Stafford, 1 Crompt. & Jerv. 391. Battley v. Catterall, 1 Moody & R. 279. Holmes v. Newlands, 11 A. & E. 50; 3 P. & D. 128, S. C. Beesley v. Dolley, 6 Bing. N. C. 37. [Harris v. Phillips, 10 C. B. 650.] For what is a sufficient statement of time in the count on an account stated, see Bingley v. Durham, 8 A. & E. 775. Leaf v. Lees, 4 M. & W. 579.

(k) Ring v. Roxbrough, 2 Tyr. 468. See 2 Wms. Saund. 171 a.

(l) This appears to be a correct general statement of the law with respect to demurrer for an impossible or inconsistent date, but the current of authorities is not quite clear and uniform on this subject. See Com. Dig. Pleader, (C. 19); 2 Wms. Saund. 291, c., n. (1); *ibid.* 171, a., n. (1). Ring v. Roxbrough, 2 Tyr. 468. Arnold v. Arnold, 3 Bing. N. C. 81.

(m) Nightingale v. Wilcoxon, 10 Barn. & Cress. 215. Edge v. Stafford, 1 Crompt. & Jer. 391.

of this kind, must state the time truly, at the peril of failure as for a variance. And here, the insertion of a videlicet will give no help. (*n*) Thus, where the declaration stated an usurious contract, made on the 21st of December, 1774, for giving day of payment of a certain sum to the 23rd of December, 1776, and the proof was, that the contract was on the 23rd December, 1774, giving day of payment for two years, it was held that the verdict must be for the defendant; the principle of this decision being, that the time given for payment, being of the substance of an usurious contract, such time must be proved as laid. (*o*) So where the declaration stated an usurious agreement, on the 14th of the month, to forbear and give day of payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was non-suited; (*p*) it being held by * Lord Mansfield, at the trial, [*331] and afterwards by the court in bank, that the day from whence the forbearance took place was material, though laid under a videlicet. (*q*)

Where the time needs not to be truly stated (as is

(*n*) *Parkinson v. Whitehead*, 2 M. & G. 329; 2 Scott's N. S. 620, S. C. [*Trix v. Thorne*, 9 Q. B. 282; *Nash v. Brown*, 6 C. B. 584.]

(*o*) *Carlisle v. Trears*, Cowp. 671; acc. *Fox v. Keeling*, 2 A. & E. 670.

(*p*) The nature of a judgment of *nonsuit* has been stated in the first chapter, *suprà*, *pp. 120, 121. It will be proper to explain here, however, that when, on account of a variance or any other matter of form, the *plaintiff understands that the judge is going to direct the [*331] jury to find a verdict against him, he usually takes the course of avoiding a verdict, by voluntarily submitting to judgment of nonsuit, and for that purpose he is supposed to absent himself from the court. The reason is, that such judgment does not prevent his bringing another action, but by a verdict he is barred for ever. See 3 Bla. Com. 376.

(*q*) *Johnson v. Picket*, cited *Grimwood v. Barritt*, 6 T. R. 483; see also *Hardy v. Cathcart*, 5 Taunt. 2. *Robson v. Fallows*, 3 Bing. N. C. 396. *Marks v. Lahee*, *ibid.* 408; 4 Scott, 137, S. C. *Cousens v. Paddon*, 5 Tyr. 547; 4 Dowl. 488; 2 C., M. & R. 547, S. C.

generally the case,) it is subject to the rule, that the plea and subsequent pleadings should follow the day alleged in the writ and declaration; (*r*) and if in these cases *no time at all* be laid, the omission is aided after verdict, or judgment by confession or default, by the operation of the statute of jeofails. (*s*) But where in the plea or subsequent pleadings the time happens to be material, it must be alleged; and there the pleader may be obliged to depart from the day in the writ and declaration.

Certainty of time is said to be required in *personal* actions only, it being held that in *real* and [*332] **mixed* actions it is in general not necessary to allege the day, month and year, and that it is sufficient to show in what king's reign the matter arose. (*t*)

RULE III.

THE PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE. (*u*)

It is in general necessary where the declaration alleges any injury to *goods and chattels*, or any contract relating to them, that their *quality*, *quantity*, and *value* or *price* should be stated. And in any action brought for *recovery of real property*, its *quality* should be shown; as, whether it consists of houses, lands, or other here-

(*r*) 2 Wms. Saund. 5, n. (3). *Hawe v. Planner*, 1 Wms. Saund. 14.

(*s*) *Higgins v. Highfield*, 13 East, 407.

(*t*) Com. Dig. Pleader, (C. 19). *The King v. Bishop of Chester*, 2 Salk. 561; *Skin*, 660; 9 Hen. VI. 115, 116.

(*u*) Oportet quod petens rem designet, quam petit, — videlicet, qualitatem, &c. — item quantitatem, &c. Bract. 431 a.; *Harpur's case*, 11 Rep. 25 b.; Doct. Pl. 85, 86. *Knight v. Symms*, Carth. 204. *Doe v. Plowman*, 1 East, 441. *Goodtitle v. Otway*, 8 East, 357. *Andrews v. Whitehead*, 13 East, 102; 1 Wms. Saund. 333, n. (7); 2 Wms. Saund. 74, n. 1.

ditaments; and in general it should be stated whether the lands be meadow, pasture, or arable, &c. And the *quantity* of the lands or other real estate must also be specified. (v) So in an action brought for *injuries* to real property, the *quality* should be shown, as
* whether it consists of houses, lands, or other [*333] hereditaments.

Thus, in an action of trespass for breaking the plaintiff's close, and taking away his fish, without showing the number or nature of the fish, it was, after verdict, objected in arrest of judgment, first, "that it did not appear by the declaration of what nature the fish were — pikes, tenches, breams, &c.;" and secondly, that "the certain number of them did not appear." And the objection was allowed by the whole court. (w) So where in an action of trespass the declaration charged the taking of cattle, the declaration was held to be bad, because it did not show of what species the cattle were. (x) So in an action of trespass where the plaintiff declared for taking goods generally, without specifying the particulars, a verdict being found for the plaintiff, the court arrested the judgment, for the uncertainty of the declaration. (y) So, in a modern case, where in an action of *replevin the plaintiff declared that the defendant, "in a certain

(v) See the authorities last cited.

(w) Playter's case, 5 Rep. 34 b.

N. B. Serjeant Williams observes, that in this case the omission would, perhaps, *now* be held to be aided after verdict, or cured by the statutes of jeofails; and as the action was not merely for taking fish, but also for breaking the close, he doubts if the declaration would now be held bad even on special demurrer; 2 Wms. Saund. 74, n. (1). And see *Chamberlain v. Greenfield*, 3 Wils. 292.

(x) *Dale v. Phillipson*, 2 Lutw. 1374.

(y) *Bertie v. Pickering*, 4 Burr. 2455. *Wiat v. Essington*, Lord Raym. 1410, S. P.

dwelling-house, took divers goods and chattels of the plaintiff," without stating what the goods were, the court arrested the judgment for the uncertainty of the declaration, after judgment by default, and a writ of inquiry executed. (z) So in an action of dower, where blanks were left in the count for the number of acres claimed, the judgment was reversed after verdict. (a) So in ejectment, the plaintiff declared for five closes of land, arable and pasture, called Long Furlongs, containing ten acres: upon not guilty pleaded the plaintiff had a verdict, and it was moved in arrest of judgment, that the declaration was ill, because the quantity and quality of the lands were not distinguished and ascertained, so as to show how many acres of arable there were, and how many of pasture; and for this reason the declaration was held ill, and the judgment arrested. (b)

With respect to *value* it is to be observed, that it should be specified in reference to the *current coin of the realm*, thus: "divers, to wit, three tables of great value, to wit, the value of twenty pounds of lawful [*335] money of Great Britain." With *respect to *quantity*, it should be specified by the ordinary measures of extent, weight, or capacity, thus; "divers, to wit, fifty acres of arable land;"—"divers, to wit, three bushels of wheat."

The rule in question, however, is not so strictly construed but that it sometimes admits the specification of *quality* and *quantity* in a *loose and general way*. Thus, a declaration in trover for two *packs* of flax and two *packs* of hemp, without setting out the weight or quantity of

(z) Pope v. Tillman, 7 Taunt. 642.

(a) Lawley v. Gattacre, Cro. Jac. 498.

(b) Knight v. Symms, Carth. 204; see Appendix, NOTE 58.

a pack, is good after verdict, and as it seems, even upon special demurrer. (c) So a declaration in trover for a *library* of books has been allowed, without expressing what they were. So where the plaintiff declared in trespass for entering his house, and taking *several keys* for the opening of the doors of his said house, it was objected, after verdict, that the kind and number ought to be ascertained. But it was answered and resolved that the keys are sufficiently ascertained by reference to the house. (d) So it was held, upon special demurrer, that it was sufficient to declare in trespass for breaking and entering a house, damaging the goods and chattels, and wrenching and forcing open the doors, without specifying the goods and *chattels or the num- [*336] ber of doors forced open; for that the essential matter of the action was the breaking and entering of the house, and the rest merely aggravation. (e)

There are also some *kinds of action* to which the rule requiring specification of quality, quantity, and value, does not apply in modern practice. Thus in actions of *debt* and *indebitatus assumpsit* (where a more general form of declaration obtains than in most other actions), if the debt is claimed in respect of goods sold, &c., the quality, quantity, or value of the goods sold is never specified. (f) Some sum, however, must be stated as the amount of the debt due upon such sale.

As with respect to *time*, so with respect to *quantity* and *value*, it is not necessary when these matters are brought into issue, that the proof should correspond

(c) 2 Saund. 74 b. n. (1).

(d) *Layton v. Grindall*, 2 Salk. 643; and see many other instances, 2 Wms. Saund. 74 b. n. (1).

(e) *Chamberlain v. Greenfield*, 3 Wils. 292.

(f) See the examples, *supra*, * pp. 36, 42.

with the averment. The pleader may in general allege any quantity or value that he pleases (at least if it be laid under a *videlicet*), without risk from the variance, in the event of a different amount being proved. (g)

But it is to be observed, that a *verdict cannot in* [*337] *general be obtained *for a larger quantity or value than is alleged.* The pleader, therefore, takes care to lay them to an extent large enough to cover the utmost case that can be proved. And it is also to be remarked that, as with respect to time, so with respect to quantity or value, there may be instances in which it forms part of the substance of the issue; and there the amount must be strictly proved as laid. (h) For example, to a declaration in *assumpsit* for 10*l.* 4*s.* and other sums, the defendant pleaded as to all but 4*l.* 7*s.* 6*d.*, the general issue; and as to the 4*l.* 7*s.* 6*d.* a tender. (i) The plaintiff replied that, after the cause of action accrued and before the tender, the plaintiff demanded the said sum of 4*l.* 7*s.* 6*d.* which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not 4*l.* 7*s.* 6*d.* but the whole 10*l.* 4*s.* This proof was held not to support the plaintiff's case. (k)

With respect to the allegation of *quality*, this in general requires to be strictly proved as laid. (l)

(g) *Crispin v. Williamson*, 8 Taunt. 107. *Robson v. Fallows*, 3 Bing. N. C. 392. *Falcon v. Benn*, 1 G. & D. 646. *Cooper v. Blick*, 2 G. & D. 295. *Anderson v. Thornton*, *ibid.* 502.

(h) *Nightingale v. Wilcoxson*, 10 Barn. & Cress. 215. *Rubery v. Stevens*, 4 Barn. & Adol. 241.

(i) As to the nature of the plea of tender, *vide supra*, * p. 252.

(k) *Rivers v. Griffiths*, 5 Barn. & Ald. 630, et *vide Cousens v. Paddon*, 5 Tyrw. 547. *Marks v. Lahee*, 3 Bing. N. C. 408.

(l) See Appendix, NOTE 54.

* RULE IV.

[* 338]

THE PLEADINGS MUST SPECIFY THE NAMES OF PERSONS. (*m*)

First, this rule applies to the *parties to the suit*.

The declaration must set forth accurately the Christian name and surname both of the plaintiff and defendant. (*n*) If either party have a name of *dignity*, such as *Earl*, &c., he must be described accordingly; and an omission or mistake in such description has the same effect as in the Christian name and surname of an ordinary person. (*o*) A mistake or omission of the Christian or surname of either party in actions real or personal, was formerly ground for plea in abatement. But by 3 & 4 W. IV. c. 42, s. 11, no plea in abatement for a misnomer shall be allowed in any personal action; but in all cases in which a misnomer would, but for this act, have been pleadable in abatement, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name. This is to be done by *taking out a summons before a judge, [* 339] founded on an affidavit of the right name; and in case the summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit. (*p*)

Secondly, The rule relates to persons *not* parties to the suit, of whom mention is made in the pleading.

(*m*) Com. Dig. Abatement, (E. 18), (E. 19), (F. 17), (F. 18); Com. Dig. Pleader, (C. 18); Bract. 301 b. *Benmore v. Neck*, 2 Har. & W. 178.

(*n*) Com. Dig. Abatement, (E. 18), (E. 19), (F. 17), (F. 18); Com. Dig. Pleader, (C. 18); Bract. 301 b. *Benmore v. Neck*, 2 Har. & W. 178.

(*o*) Com. Dig. Abatement, (E. 20), (F. 19).

(*p*) For late decisions on the subject of misnomer, see *Moody v. Aslatt*, 5 Tyrw. 492. *Finch v. Cockin*, *ibid.* 774. *Lindsay v. Wells*, 3 Bing. N. C. 777.

The names of such persons, viz. the Christian name and surname, or name of dignity, must in general be given; (*pp*) but if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name. (*q*)

A mistake in the name of a *party to the suit* cannot be objected as a variance at the trial; but the name of a person *not* party is a point on which the proof must correspond with the averment, under peril of a fatal variance. Thus where a bill of exchange drawn by John *Couch* was declared upon as drawn by John [* 340] *Crouch*, and the defendant *pleaded the general issue, the plaintiff was non-suited. (*r*) So where the declaration stated that the defendant went before Richard Cavendish Baron Waterpark, of *Waterfork*, one of the justices, &c. for the county of Stafford, and falsely charged the plaintiff with felony, &c., and upon the general issue it appeared in evidence that the charge was made before Richard Cavendish Baron Waterpark, of *Waterpark*, this was held a fatal variance in the name of dignity. (*s*)

[(*pp*) *Gatty v. Field*, 9 Q. B. 431. *Appelmans v. Blanche*, 14 M. & W. 154. *Sturge v. Rahn*, 4 Ex. 646. Compare *Smith v. Ball*, 9 Q. B. 361. But in *Queen v. Dale*, 17 Q. B. 64, proceedings in *scire facias* on a recognisance, the declaration stated that the recognisance had been acknowledged before "J. H. Harper." A demurrer was overruled, the court saying that "J" may have been the full Christian name of the person, and adding, "There is no doubt that a vowel may be a good Christian name, why not a consonant?"]

(*q*) *Buckley v. Rice Thomas*, Plowd. 128 a. *Rowe v. Roach*, 1 M. & S. 304. *Ball v. Gordon*, 9 M. & W. 345. *Tigar v. Gordon*, *ibid.* 347.

(*r*) *Whitwell v. Bennett*, 3 Bos. & Pul. 559; see also *Bowditch v. Mawley*, 1 Camp. 195. *Hutchinson v. Piper*, 4 Taunt. 810.

(*s*) *Walters v. Mace*, 2 Barn. & Ald. 756. This variance would now, however, no doubt be amendable under the late statutes 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, vide *suprà*, * p. 95.

RULE V.

THE PLEADINGS MUST SHOW TITLE. (t)

When, in pleading, any right or authority is set up in respect of property personal or real, some *title* to that property must of course be alleged in the party, or in some other person from whom he derives his authority. (u) So if a party be charged with any *liability* in respect of property personal or real, his *title* to that property must be alleged.

* It is proposed, first, to consider the case of [* 341] a party's alleging title *in himself, or in another whose authority he pleads*; next, that of his alleging it *in his adversary*.

I. Of the case where a party alleges title *in himself, or in another whose authority he pleads*.

In this case the title must in general be fully and particularly alleged. With respect to the manner of its allegation, more specifically considered, it is to be observed, that there are certain forms used in pleading appropriate to each different kind of title, according to all the different distinctions as to *the tenure, the kind or quantity of estate, the time of enjoyment, the number of owners, and the manner of derivation or acquisition*. (v) These forms are too various to be here stated; and it will be sufficient to refer the reader to the copious stores in the printed precedents. (w)

There is, however, one case which it will be proper to

(t) Com. Dig. Pleader, (3 M. 9); Bract. 372 b., 373 b. *Pearle v. Bridges*, 2 Wms. Saund. 401. *Cunliffe v. Whitehead*, 3 Bing. N. C. 828; 6 Dowl. 63; 5 Scott, 31, S. C.

(u) Ibid.

(v) Vide 2 Bl. Com. 103; 2 Chit. 375, et seq. 6th edit.

(w) See 2 Chit. 375, et seq. 6th edit.

notice more particularly, because a recent statute, 2 & 3 Will. IV. c. 71, has provided for it a new form of plea, materially different from that which had been anciently used. It is the case where a prescriptive right [* 342] is claimed to an * easement, or to any profit or benefit taken or arising out of land. Formerly it was necessary, where there was occasion to plead a right of this description (for example, a prescriptive right of way or common), to allege a seisin in fee of the close or other corporeal hereditament in respect of which the right was claimed, and then to prescribe for it in a *que estate*, that is, to allege that the person so seised, and all those whose estate he had in the premises, had from time immemorial exercised the right in question. (x) But by the statute above mentioned, shorter periods of prescription are now appointed; and it is provided, that it shall be sufficient to allege the enjoyment of the way, common, &c. as of right, by the occupiers of the tenement in respect whereof the right is claimed, for such certain period of time as is applicable according to the provisions of the act, to the particular case; without claiming in the name or right (as heretofore) of the owner of the fee.

There are also certain general rules relative to the manner of showing title, in pleading, of which it will be useful to give some account.

[* 343] * There is a leading distinction on this subject between *estates in fee simple* and *particular estates*.

In general it is sufficient to state a *seisin in fee simple*

(x) 2 Wms. Saund. 401 a. *Attorney-General v. Gauntlett*, 3 Y. & J. 98. But where a right of common was claimed by a *copyholder*, by *custom*, he was not obliged to show his estate in the copyhold tenement, *Hoskins v. Robins*, 2 Wms. Saund. 320. As to making a title by a *que estate*, vide post, * p. 360.

—*per se*; that is, simply to state (according to the usual form of alleging that title) that the party was “seised in his demesne as of fee, of and in a certain mesuage,” &c., (*y*) without showing the *derivation*, or (as it is expressed in pleading) the *commencement* of the estate. (*z*) For if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principle, to show from whom that person derived *his*, and so ad infinitum. Besides, as mere seisin will be sufficient to give an estate in fee simple, the estate may for anything that appears, have had no other commencement than the seisin itself, which is alleged. So, though the fee be *conditional* or *determinable* on a certain event, yet a seisin in fee may be alleged, without showing the commencement of the estate. (*a*)

However, it is sometimes necessary to show the derivation of the fee; viz. where in the pleading, the seisin has already been alleged in another person, from whom the present party claims. In such case, it must of course be shown how it * passed from one of [*344] these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff having alleged that his ancestor was seised in fee, and made the lease, must proceed to show how the fee passed to himself, viz. by descent. (*b*) So, if in trespass, the defendant plead that *E. F.* being seised in fee, demised to *G. H.*, under whose command the defendant justifies the trespass on the land (giving colour); and the plaintiff in his replication admits *E. F.*'s seisin, but sets up a subsequent title in

(*y*) As in the examples, *suprà*, * pp. 32, 196.

(*z*) Co. Litt. 303 b. *Seavage v. Hawkins*, Cro. Car. 571.

(*a*) Doct. Pl. 287; *Seymor's case*, 10 Rep. 98.

(*b*) As in the example, *suprà*, * p. 194.

himself to the same land in fee simple, prior to the alleged demise, he must show the derivation of the fee from *E. F.* to himself, by conveyance antecedent to the lease under which *G. H.* claims. (c)

With respect to *particular estates*, the general rule is, *that the commencement of particular estates must be shown.* (d) If therefore a party sets up in his own favour an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement, that is, from the last seisin in fee simple; and if derived by alienation or conveyance, the *substance and effect of such conveyance should be precisely set forth.

Under this rule, *that the commencement of particular estates must be shown*, it is necessary to show the commencement of a *copyhold*, even though it be copyhold of *inheritance.* (e) This is on the ground that a copyhold, even in fee, is in the nature of a particular estate in respect of the freehold inheritance in the lord. And the difficulty that would arise, if the title were to be deduced from the earliest or original grantee, is obviated, by the practice of going back to the admittance of the last heir or surrenderee only; which admittance is considered as in the nature of a grant from the lord, and so pleaded. (f) It is in this manner, that the commencement of a copyhold estate is in general alleged,—

(c) See Upper Bench Precedents, 196, cited 9 Went. Index, xl. xli.

(d) Co. Litt. 303 b. Scilly v. Dally, 2 Salk. 562; Carth. 444, S. C. Searl v. Bunnion, 2 Mod. 70. Johns v. Whitly, 3 Wils. 72. Hendy v. Stephenson, 10 East, 60; Rast. Ent. 656; and the case of title derived from the king, is no exception. 1 Wms. Saund. 186 d. n. (1).

(e) Pyster v. Hemling, Cro. Jac. 103; Shephard's case, Cro. Car. 180. Robinson v. Smith, 4 Mod. 346.

(f) See same cases, and Brown's case, 4 Rep. 22 b.; Bac. Ab. Pleas, &c. p. 422, 5th edit.

namely, by stating it as a grant from the lord ; (g) but where an estate has been already laid in another copyholder from whom the present party claims, and it becomes necessary therefore to show how the estates passed from one to the other, the conveyances between the copyhold tenants, by surrender and the * admittance by the lord, &c., must [*346] then be set forth according to the fact. (h)

To the rule, *that the commencement of particular estates must be shown*, there is this exception, that it need not be shown where the title is alleged by way of *inducement* only. (i) Thus, if an action of debt or covenant be brought on an indenture of lease, by the executor or assignee of a lessor, who had been entitled for a term of years, it is necessary in the declaration to state the title of the lessor, in order to show that the plaintiff is entitled to maintain the action as his representative or assignee. But as the title is in that case alleged by way of inducement only (the action being mainly founded on the lease itself), and therefore it is probable that the title may not come into question, the particular estate for years may be alleged in the lessor, without showing its commencement.

On the subject of the *derivation of title*, the following additional rules may be collected from the books :

* First, *Where a party claims by inheritance, he* [*347]

(g) As to *customary freeholds*, see *Croucher v. Oldfield*, Salk. 365. *Roe v. Vernon*, 5 East, 51. *Burrell v. Dodd*, 3 Bos. & Pul. 378; 2 Chitty, 381, 6th edit.

(h) See the forms, 2 Chitty, 380, 394, 6th edit.

(i) Com. Dig. Pleader, (E. 19), (C. 43). *Blockley v. Slater*, Lutw. 120. *Searl v. Bunnion*, 2 Mod. 70. *Scilly v. Dally*, Carth. 444. *Skevill v. Avery*, Cro. Car. 138. *Lodge v. Frye*, Cro. Jac. 52. *Adams v. Cross*, 2 Vent. 181. *Wade v. Baker*, Ld. Raym. 130.

must in general show how he is heir, viz., as son or otherwise; (k) and if he claim by mediate, not immediate descent, he must show the pedigree; for example, if he claims as nephew, he must show how nephew. (l)

Secondly, *Where a party claims by conveyance or alienation, the nature of the conveyance or alienation must in general be stated, as whether it be by devise, feoffment, &c. (m)*

Thirdly, *The nature of the conveyance or alienation should be stated according to its legal effect, rather than its form of words.* This depends on a more general rule, which we shall have occasion to consider in another place, viz., “that things are to be pleaded according to their legal effect or operation.” For the present, the doctrine as applicable to conveyances, may be thus illustrated:—In pleading a conveyance for *life*, [*348] with *livery of seisin, the proper form is to allege it as a “demise” for life, (n) for such is its effect in proper legal description. So a conveyance in *tail*, with livery, is always pleaded (on the same principle) as a “gift” in tail; (o) and a conveyance of the fee, with livery, is described by the term “enfeoffed.” (p) And such would be the form of pleading

(k) *Denham v. Stephenson*, 1 Salk. 355. *The Duke of Newcastle v. Wright*, 1 Lev. 190. *Reynoldson v. Blake*, 1 Ld. Raym. 202; see the example, *suprà*, *p. 194.

(l) *Dumsday v. Hughes*, 3 Bos. & Pul. 453. *Blackborough v. Davis*, 12 Mod. 619; and see *Roe v. Lord*, 2 Bla. Rep. 1099, and the cases there cited. By 3 & 4 Will. IV. c. 106, s. 5, the descent from a brother or sister is not to be considered as immediate (as it formerly was), but is to be traced through the parent. As to the manner of showing the pedigree in general, see *Rellow v. Rowden*, Show. 244; Co. Ent. 196, 596 u, 597; 2 Wms. Saund. 45 (e); 10 Went. 214.

(m) Com. Dig. Pleader, (E. 28), (E. 24).

(n) Rast. Ent. 647 a., 11 d.

(o) See Co. Ent. tit. Formedon, &c. &c.

(p) Upper Bench Prec. 196; see 2 Chitty, 385, 6th ed. “Feoffment properly betokeneth a conveyance in fee, and yet sometimes improperly it

whatever might be the *words* of donation used in the instrument itself, which in all the three cases are often the same, viz. those of "give" and "grant." (*q*) So in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release, and confirm," yet it should be pleaded as a *release* only, for that is the legal effect. (*r*) So a surrender (whatever words are used in the instrument) should be pleaded with *sursum reddidit*, which alone, in pleading, describes the operation of a conveyance as a surrender. (*s*)

* Fourthly, *Where the nature of the conveyance* [*349] *is such, that it would at common law be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires at common law, a deed or other written instrument, such instrument must be alleged.* (*t*) Therefore a conveyance with livery of seisin, either in fee, tail, or for life, is pleaded without alleging any charter or other writing of feoffment, gift, or demise, whether such instrument in fact accompanied the conveyance or not. For such conveyance might at common law be made by parol only; (*u*) and though by the Statute of Frauds, 29 Car. II. c. 3, s. 1, it will not now be valid unless made in writing, yet the form of *plead-*

is called a feoffment, when an estate of freehold only doth passe," Co. Litt. 9 a. *Feoffare* dicitur qui feodum simplex feoffatorio confert, *donare* qui feodum talliatum. Spelm. Gloss. verbo *feoffare*. And Lord Coke, in another place, makes the distinction laid down in the text between *feoffment*, *gift*, and *demise*. Vynior's case, 8 Rep. 82 b.

(*q*) "Do or dedi is the aptest word of feoffment." Co. Litt. 9 a.

(*r*) 2 Chitty, 389, n. (*p.*), 6th edit. 1 Arch. 127; 3 Went. 483, 515.

(*s*) 1 Wms. Saund. 235 b. n. (9). As to pleading an appointment under a power, vide Wright v. Williams, 1 Tyrw. & G. 375.

(*t*) Vin. Abr. *Faits or Deeds*, (M. a., 11).

(*u*) Vin. Abr. *Feoffment*, (Y.); Co. Litt. 121 b.

several times when, &c. broke and entered the said close in which, &c. and with feet in walking trod down, trampled upon, consumed and spoiled the grass and herbage then and there growing, as he lawfully might for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the defendant is ready to verify.

This allegation of a *general freehold title* will be sustained by proof of *any* estate of *freehold*—whether in fee, in tail, or for life only, and whether in possession, or expectant on the determination of a term of years. (*d*) But it does not apply to the case of a freehold estate in remainder or reversion expectant on a particular estate of freehold, nor to copyhold tenure.

The plea or avowry of *liberum tenementum* is the only case of usual occurrence in modern practice in which the allegation of a *general freehold title*, in lieu of a *precise* allegation of title, is sufficient. (*e*)

[*353] * This plea may appear at first sight opposed to principle, as giving no *colour* to the plaintiff. It has been long ago decided, however, that it is not open to this objection; because, though it asserts the *freehold* to be in the defendant, it does not exclude the possibility of the plaintiff's being possessed of the premises for a *term of years*; and it leaves him therefore a sufficient colour to maintain the action. (*f*) The same

(*d*) See 5 Hen. VII., 10 a, pl. 2, which shows that where there is a lease for years, it must be applied in confession and avoidance, and is no ground for traversing the plea of *liberum tenementum*.

(*e*) See 1 Wms. Saund. 347 d., n. (6). This form of allegation [*353] * occurred, however, in the now abolished actions of assise, the count or plaint in which lays only a general freehold title, Doct. Pl. 289. It occurred also in the count on a writ of entry sur disseisin brought by tenant for life or in tail. Booth, 177; 83 Hen. VI., 14 b. Careswell v. Vaughan, 2 Saund. 80.

(*f*) Leyfield's case, 10 Co. 89 b. Doe v. Wright, 10 A. & E. 763.

doctrine is also held with respect to a plea that the defendant is *seised in fee*; for this, like the general plea of freehold, is compatible with the plaintiff's possession for a term of years. (*g*) But (as we have elsewhere seen) a plea that *J. S.* was seised in fee, and demised to the defendant for years, is bad for want of colour, unless express colour be given. (*h*)

In alleging a general freehold title, it is not necessary (as appears by the above example) to *show its commencement*. (*i*).

* 2. It is often sufficient to allege a title of [*354] mere *possession*.

The form of laying a title of possession, in respect of *goods and chattels*, is either to allege that they were the "goods and chattels of the plaintiff," or that he was "lawfully possessed of them as of his own property." (*k*) With respect to *corporeal hereditaments*, the form is either to allege that the close, &c. was the "close of" the plaintiff, (*l*) or that he was "lawfully possessed of a certain close," &c. (*m*) With respect to *incorporeal hereditaments*, a title of possession is generally laid, by alleging that the plaintiff was possessed of the corporeal thing, in respect of which the right is claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage, &c., and by reason thereof, during all the time

(*g*) *Leyfield's case*, 10 Co. 89 b. *Stott v. Stott*, 16 East, 343. *Johnson v. Faulkner*, 2 G. & D. 184.

(*h*) *Vide supra*, * p. 239.

(*i*) See farther as to the plea of *liberum tenementum*, *Lambert v. Stroothen*, Willes, 218. *Smith v. Royston*, 1 Dowl. N. S. 124; 8 M. & W. 381, S. C.

(*k*) As in the examples, *supra*, * pp. 44, 48.

(*l*) As in the example, *supra*, * p. 40.

(*m*) See an example, 3 Chitty, 983, 6th edit.

aforesaid, of right ought to have had common of pasture," &c. (n)

A title of possession is *applicable*, that is, will be sufficiently sustained by the proof, in all cases where [*355] the interest is of a present and immediate * kind.

Thus when a title of possession is alleged with respect to *goods and chattels*, the statement will be supported by proof of any kind of *present interest* in them, whether that interest be temporary and special, or absolute in its nature — as for example, whether it be that of a carrier or finder only, or that of an owner and proprietor. (o) So where a title in possession is alleged in respect of *corporeal or incorporeal hereditaments*, it will be sufficiently maintained by proving any kind of *estate in possession*, whether fee simple, fee tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence, by proof of an interest in *remainder* or *reversion* only; and, therefore, when the interest is of that description, the preceding forms are inapplicable; and the title must be laid in remainder or reversion according to the fact.

Where a title of possession is *applicable*, the allegation of it is in many cases *sufficient* in pleading, without showing title of a superior kind. The rule on this subject is as follows — *that it is sufficient to allege possession as against a wrong-doer*; (p) or, * in other words, that it is enough to lay a title of possession, against a person, who is stated to have committed

(n) See an example, 2 Chitty, 569, 6th edit.

(o) 2 Wms. Saund. 47 a., n. (1).

(p) Com. Dig. Pleader, (C. 39), (C. 41). Taylor v. Eastwood, 1 East, 212. Grimstead v. Marlowe, 4 T. R. 717. Greenhow v. Ilsley, Willes, 619. Waring v. Griffiths, 1 Burr. 440. Langford v. Webber, 3 Mod. 132. Purnell v. Young, 3 M. & W. 288. Carnaby v. Welby, 8 A. & E. 872.

an injury to such possession, having as far as it appears, no title himself. Thus, if the plaintiff declares in trespass, for breaking and entering his close, or in trespass on the case, for obstructing his right of way, it is enough to allege in the declaration in the first case, that it is the "close of the plaintiff," (*q*) in the second case, that "he was possessed of a certain messuage, &c., and by reason of such possession, of right ought to have had a certain way," &c. (*r*) For if the case was, that the plaintiff being possessed of the close, the defendant having himself no title, broke and entered it, or, that the plaintiff being possessed of a messuage and right of way, the defendant being without title, obstructed it, then whatever was the nature and extent of the plaintiff's title in either case, the law will give him damages for the injury to his possession; and it is the possession therefore, only, that needs to be stated. It is true that it does not yet appear that the defendant had no title, and by his plea, he may possibly set up one superior to that of the plaintiff; but as on the other hand, it does not yet appear that he *had* title, the effect is the same; and till he pleads, he must be considered as a mere *wrongdoer*; that is, he must be taken to have *com- [* 357] mitted an injury to the plaintiff's possession without having any right himself. Again, in an action of trespass for assault and battery, if the defendant justifies on the ground that the plaintiff wrongfully entered his house, and was making a disturbance there, and that the defendant gently removed him, the form of the plea is that "the defendant was lawfully possessed of a certain dwelling-house, &c.; and being so possessed the said plaintiff was unlawfully in the said

(*q*) See the form of declaration, *supra*, *p. 40.

(*r*) See 2 & 3 Will. IV. c. 71, s. 5.

dwelling-house," &c.; and it is not necessary for the defendant to show any title to the house, beyond this of mere possession. (s) For the *plaintiff* has at present set up no title at all to the house, and on the face of the plea he has committed an injury to the defendant's possession, without having any right himself. So in an action of trespass for seizing cattle, if the defendant justifies on the ground that the cattle were damage-feasant on his close, it is not necessary for him to show any title to his close, except that of mere possession. (t)

[*358] * It is to be observed, however, with respect to this rule, as to alleging possession against a wrong-doer, that it seems not to hold in *Replevin*. For in that action it is held not to be sufficient to state a title of possession, even in a case where it would be allowable in Trespass, by virtue of the rule above mentioned. Thus, in replevin, if the defendant by way of avowry, pleads that he was possessed of a messuage, and entitled to common of pasture, as appurtenant thereto, and that he took the cattle damage-feasant, it seems that this pleading is bad; and that it is not sufficient to lay such mere title of possession in this action. (u) It is to be observed too, that this rule has little or no application in *real* or *mixed actions*; for in

(s) 3 Chitty, 981, 6th edit. *Skevell v. Avery*, Cro. Car. 138.

(t) 1 Wms. Saund. 221, n. (1), 346 e., n. (2); 2 Wms. Saund. 285, n. (3); Bac. Ab. Trespass, 613, 5th edit.; Anon. Salk. 643. *Searl v. Bunnion*, 2 Mod. 70. *Osway v. Bristow*, 10 Mod. 37. *Hawkins v. Eckles*, 2 Bos. & Pul. 361, n. (a). *Langford v. Webber*, 3 Mod. 132; but see S. C. Carth. 9; 3 Salk. 356.

N. B. It is sometimes said that the reason why it is sufficient to lay a possessory title in such cases, is, that the title is matter of *inducement* only to the main subject of the plea. But this doctrine, if well examined, resolves itself into the broader and more extensive rule given in the text.

(u) *Hawkins v. Eckles*, 2 Bos. & Pul. 359, 361, n. (a); per Buller, J.

these, an injury to the possession is seldom alleged : the question in dispute being, for the most part, on the *right of possession* ; or the *right of property*.

II. Having discussed the case where a party alleges title *in himself, or some other whose authority he pleads*, next is to be considered the case where a party alleges title *in his adversary*.

The rule on this subject, appears in general to * be, *that it is not necessary to allege title more [*359] precisely than is sufficient to show a liability in the party charged, or to defeat his present claim*. Except as far as these objects may require, a party is not compellable to show the precise estate which his adversary holds, even in a case where, if the same person were pleading his own title, such precise allegation would be necessary. The reason of this difference is, that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own. (*v*)

To answer the purpose of showing a liability in the party charged, according to the rule here given, it is in most cases sufficient to allege a *title of possession* ; the forms of which are similar to those in which the same kind of title is alleged in favour of the party pleading.

A title of possession, however, (as shown under a former head,) cannot be sustained in evidence, except by proving some *present interest* in chattels or *actual possession* of land. (*w*) If, therefore, the interest be by way of reversion or remainder, it must be laid accordingly,

Dovaston v. Payne, 2 H. Bl. 530 ; 1 Wms. Saund. 346 e. n. (2) ; 2 Wms. Saund. 295, n. (3). *Saunders v. Hussey*, 2 Lutw. 1231 ; Carth. 2 ; Ld. Raym. 333, S. C. ; but see *Adams v. Cross*, 1 Vent. 181.

(*v*) *Rider v. Smith*, 3 T. R. 766. *Derisley v. Custance*, 4 T. R. 77. *The Attorney-General v. Meller*, Hardr. 459.

(*w*) Vide *suprà*, * p. 355.

and the title of possession is *inapplicable*. So there are cases, in which to charge a party with mere [*360] possession, would not *be *sufficient* to show his liability. Thus in declaring against him in debt for rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was possessed as assignee of the term.

Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is yet not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own, (x) and it seems sufficient that it be laid fully enough to show the liability charged. Therefore, though it is the rule with respect to a man's own title, *that the commencement of particular estates should be shown*, (y) unless alleged by way of *inducement*, (z) yet in pleading the title of an adversary, it seems that this is in general not necessary. (a) So in cases where it happens to be requisite to show whence the adversary derived his title, this may be done with less precision than where a man alleges his own. And in general it is sufficient to plead such title by a *que estate*, that is, to allege that the opposite party has the same estate, as has been precedently laid in some other person, without showing in what manner the [*361] estate passed from *the one to the other. (b)

(x) Com. Dig. Pleader, (C. 42). *Hill v. Saunders*, 4 Barn. & Cress. 536.

(y) Vide *suprà*, *p. 344.

(z) Vide *suprà*, *p. 346.

(a) *Blake v. Foster*, 8 T. R. 487.

(b) As to making title by a *que estate*, see the *Attorney-General v. Meller*, Hardr. 459; Doct. Pl. 302; Com. Dig. Pleader, (E. 23), (E. 24); Co. Litt. 121 a.; Dyer, 172 u.; 3 Bla. Com. 264; 1 Wms. Saund. 346, n. (2).

Thus in debt, where the defendant is charged for rent as the assignee of the term after several mesne assignments, it is sufficient, after stating the original demise, to allege, that "after making the said indenture, and during the term thereby granted, to wit, on the — day of —, in the year —, all the estate and interest of the said *E. F.*" (the original lessee) "of and in the said demised premises, by assignment, came to and vested in the said *C. D.*," without further showing the nature of the mesne assignments. (c) But if the case be reversed, that is, if the plaintiff, claiming as assignee of the reversion, sue the lessee for rent, he must precisely show the conveyances, or other media of title, by which he became entitled to the reversion; and to say generally that it came by assignment, will not, in this case, be sufficient without circumstantially alleging all the mesne assignments. (d) Upon the same principle, if title be laid in an adversary, by descent, as for example, where an action of debt is brought against an heir on the bond of his ancestor, * it [*362] is sufficient to charge him as an *heir*, without showing *how* he is heir, viz. as son or otherwise; (e) but if a party entitle *himself* by inheritance, we have seen that the mode of descent must be alleged. (f)

The manner of showing title both where it is laid in the party himself, or the person whose authority he pleads, and where it is laid in his adversary, having been now considered, it may next be observed, that the

(c) 1 Wms. Saund. 112, n. (1). *The Attorney-General v. Meller*, Hardr. 459. *The Duke of Newcastle v. Wright*, 1 Lev. 190. *Derisley v. Custance*, 4 T. R. 77; 2 Chitty, 280, 6th edit.

(d) 1 Wms. Saund. 112, n. (1). *Pitt v. Russell*, 3 Lev. 19; *Dyer*, 172 a.

(e) *Denham v. Stephenson*, 1 Salk. 355.

(f) Vide *supra*, * p. 347.

title so shown must in general, when issue is taken upon it, be strictly *proved*. With respect to the allegations of *time, quantity and value*, it has been seen that they, in most cases, do not require to be proved as laid, at least if laid under a *videlicet*. But with respect to *title*, it is ordinarily of the substance of the issue; and, therefore, according to the general principle stated in the first chapter of this work, (*g*) requires to be maintained accurately by the proof. Thus in an action on the case, the plaintiff alleged in his declaration that he demised a house to the defendant for seven years, and that during the term, the defendant so negligently kept his fire that the house was burned down; and the defendant having pleaded *non demisit modo et formâ*, it appeared in evidence that the plaintiff had [*363] demised to the *defendant several tenements, of which the house in question was one; but that with respect to this house, it was, by an exception in the lease, demised at will only. The court held, that though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet having stated a demise for seven years, the proof of a lease at will was a variance, and *that* in substance, not in form only; and on the ground of such variance, judgment was given for the defendant. (*h*)

The rule which requires that the title should be shown, having now been explained, it will be proper to notice an exception to which it is subject. This exception is, that no title need be shown where the opposite party is *estopped* from denying the title. Thus in an action for goods sold and delivered, it is unnecessary, in

(*g*) *Suprà*, * pp. 93, 94.

(*h*) *Cudlip v. Rundle, Carth. 202. As to variance, see suprà*, * pp. 93, 94.

addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were the goods *of the plaintiff*; (i) for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So in debt or covenant brought by the lessor against the lessee on the covenants of the lease, the plaintiff need allege no title to the premises demised, because * a tenant is estopped from [*364] denying his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorise the lease; and, therefore, if the action be brought not by the lessor himself, but by his heir, executor, or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff, in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was seised in fee, for the tenant is not bound to admit that he was seised in fee; and unless he was so, the plaintiff cannot claim as heir.

Another exception to the general rule requiring title to be shown, has been introduced by statute, and is as follows; — In making avowry or cognisance in replevin upon distresses for rent, quit-rents, reliefs, heriots, or other services, the defendant is enabled by the provisions of the act, 11 Geo. II. c. 19, s. 22, “to avow or make cognisance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise, at such a certain rent, during the time wherein the rent distrained for incurred; which rent was then and still remains due; or that the

(i) Bull. N. P. 139.

place, where the distress was taken, was parcel
 [*365] of such certain tenements * held of such honour,
 lordship, or manor; for which tenements the
 rent, relief, heriot, or other service distrained for, was at
 the time of such distress, and still remains, due; without
 further setting forth the grant, tenure, demise, or title
 of such landlord or landlords, lessor or lessors, owner or
 owners of such manor; any law or usage to the
 contrary notwithstanding." (k)

RULE VI.

THE PLEADINGS MUST SHOW AUTHORITY. (l)

In general when a party has occasion to justify under
 a writ, warrant, precept, or any other authority what-
 ever, he must set it forth particularly in his pleading.
 And he ought also to show that he has substantially
 pursued such authority.

Thus, in trespass for taking a mare, the defend-
 ant pleaded that Sir *J. S.* was seised in fee of the
 manor of *B.*, and that he and all those
 [*366] whose *estate he had in the said manor had
 always held a lawful court twice a year, to
 which the tenants of the manor used to resort; that
 such as had right of common were appointed by the
 steward to be of the jury; that by-laws were ac-
 customed to be made there, and that such as had right

(k) See remarks on this enactment, and on the previous state of the
 law, 2 Wms. Saund. 284 c., n. (3). And see the form of an avowry under
 the statute, 3 Chitty, 952, 6th edit.

(l) "Regularly whensoever a man doth anything by force of a warrant
 or authority, he must plead it." Co. Litt. 283 a.; *ibid.* 303 b.; Com. Dig.
 Pleader, (E. 17); 1 Wms. Saund. 298, n. (1). *Lamb v. Mills*, 4 Mod. 377.
Matthews v. Cary, 3 Mod. 137; *Carth.* 73, S. C. *Collett v. Lord Keith*,
 2 East, 260; *Selw. N. P.* 826. *Rich v. Woolley*, 7 Bing. 651.

of common obeyed those laws, or paid a forfeiture of a reasonable sum to be imposed on them: that at one of these courts a jury was sworn, and a law made, that every person who had common should pay forty shillings for depasturing his cattle on any place where corn was standing; that the plaintiff had right of common, and permitted his sheep to depasture on certain ground on which corn was standing; that such offence was presented at the next court, and that the defendant, *being bailiff of the lord of the said manor*, did take the mare for the forfeiture, &c. Upon demurrer the court held the plea bad, "for the bailiff cannot take a forfeiture ex officio. There must be a precept directed to him for that purpose, which he must show in pleading," &c. And judgment was given for the plaintiff.(m)

So in all cases where the defendant justifies under judicial process, he must set it forth particularly in his plea; and it is not sufficient to allege *generally* that he committed the act in *question by [*367] virtue of a certain writ or warrant directed to him.(n) But on this subject there are some important distinctions as to the degree of particularity which the rules of pleading in different cases require; 1. It is not necessary that any person justifying under judicial process should set forth *the cause of action* in the original suit in which that process issued;(o) 2. If the justification be by the officer executing the writ, he is required to plead such *writ* only, and not the *judgment* on which it was founded; for his duty obliged him to execute the former, without inquiring about the validity or exist-

(m) *Lamb v. Mills*, 4 Mod. 377.

(n) 1 Wms. Saund. 298, n. (1); Co. Litt. 303 b.

(o) *Rowland v. Veale*, Cowp. 18. *Belk v. Broadbent*, 3 T. R. 188; 1 Wms. Saund. 92, n. (2).

ence of the latter. (*p*) But if the justification be by a party to the suit, or by any stranger, except an officer, the judgment as well as the writ must be set forth. (*q*) 3. Where it is an officer who justifies, he must show that the writ was *returned*, if it was such as it was his duty to return. But in general a writ of execution need not be returned; and, therefore, no return [*368] of it need in general be **alleged*. (*r*) However, it is said that “if any ulterior process in execution is to be resorted to, to complete the justification, there it may be necessary to show to the court the return of the prior writ, in order to warrant the issuing of the other.” (*s*) Again, there is a distinction as to this point between a principal and a subordinate officer. “The former shall not justify under the process, unless he has obeyed the order of the court in returning it; otherwise it is of one who has not the power to procure a return to be made;” (*t*) 4. Where it is necessary to plead the judgment, that may be done (if it was a judgment of a superior court) without setting forth any of the previous proceedings in the suit; (*u*) 5. Where the justification is founded on pro-

(*p*) *Andrews v. Marris*, 1 Q. B. 3; 1 G. & D. 268, S. C.

(*q*) Per Holt, C. J., *Britton v. Cole*, Carth. 443; 1 Salk. 408, S. C. *Turner v. Felgate*, 1 Lev. 95. *Cotes v. Michill*, 3 Lev. 20; per De Grey, C. J., *Barker v. Braham*, 3 Wils. 368. But in *Britton v. Cole*, 1 Salk. 408, it is said that the court “seemed to hold, that if one comes in aid of the officer at his request, he may justify as the officer may do.” See *Morse v. James*, Willes, 122.

(*r*) *Middleton v. Price*, Stra. 1184; 1 Wils. 17, S. C. *Cheasley v. Barnes*, 10 East, 73. *Rowland v. Veale*, Cowp. 18; *Hoe’s case*, 5 Rep. 90; 1 Wms. Saund. 92, n. (2).

(*s*) *Cheasley v. Barnes*, 10 East, 73.

(*t*) Per Holt, C. J., *Freeman v. Blewett*, Ld. Raym. 633; 1 Salk. 409, S. C. *Moore v. Taylor*, 5 Taunt. 69.

(*u*) See the precedents, 9 Went. 22, 53, 120, 351; 3 Chitty, 795, 6th edit.

cess issuing out of an inferior English court, or, as it seems, a court of foreign jurisdiction, the nature and extent of the jurisdiction of such court ought to be set forth; and it ought to be shown that the cause of action arose within that jurisdiction; though a justification founded on process of any of the superior courts *need not contain any such allegations. (v) [*369] And in pleading a judgment of inferior courts, the previous proceedings are in some measure stated. But it is allowable to set them forth with a *taliter processum est*, thus, that *A. B.* at a certain court, &c., held at, &c., levied his plaint against *C. D.* in a certain plea of trespass on the case or debt, &c., (as the case may be) for a cause of action arising within the jurisdiction, and *thereupon such proceedings were had*, that afterwards, &c., it was considered by the said court that the said *A. B.* should recover against the said *C. D.* &c. (w)

Notwithstanding the general rule under consideration, it is allowable, where an authority may be constituted verbally and generally, to plead it in general terms. Thus in replevin, where the defendant makes cognisance confessing the taking of the goods or cattle as bailiff of another person for rent in arrear or as damage-feasant, it is sufficient to say, that “as bailiff of the said *E. T.* he well acknowledges the taking, &c., as for and in the name of a distress, &c.” without showing any warrant for that purpose. (x)

* The allegation of *authority*, like that of *title*, [*370] must in general be strictly proved as laid.

(v) *Collet v. Lord Keith*, 2 East, 274. *Moravia v. Sloper*, Willes, 80. *Morrell v. Martin*, 4 Scott’s N. R. 300.

(w) 1 Wms. Saund. 92, n. (2). *Lane v. Robinson*, 2 Mod. 102. *Rowland v. Veale*, Cowp. 18. *Morse v. James*, Willes, 122. *Johnson v. Warner*, *ibid.* 528. *Titley v. Foxall*, *ibid.* 688.

(x) *Matthews v. Cary*, 3 Mod. 138.

The above-mentioned particulars of *place, time, quality, quantity, and value, names of persons, title, and authority*, though in this work made the subjects of distinct rules, in a view to convenient classification and arrangement, are to be considered but as examples of that infinite variety of circumstances, which it may become necessary in different cases and forms of action to particularize for the sake of producing a certain issue; — for it may be laid down as a comprehensive rule, that,

RULE VII.

IN GENERAL WHATEVER IS ALLEGED IN PLEADING MUST BE ALLEGED WITH CERTAINTY. (y)

This rule being very wide in its terms, it will be proper to illustrate it by a variety of examples.

In pleading *the performance of a condition or covenant*, it is a rule, though open to exceptions that will be presently noticed, that the party must not plead generally that he performed the covenant or condition, but must show specially the time, place, and manner of [*371] performance; and even though the *subject to be performed should consist of several different acts, yet he must show in this special way the performance of each. (z) Thus, in debt on bond conditioned to show on a certain day a sufficient discharge

(y) Com. Dig. Pleader (C. 17), (C. 22), (E. 5), (F. 17).

(z) Com. Dig. Pleader, (E. 25), (E. 26), (2 W. 33). *Halsley v. Carpenter*, Cro. Jac. 359. *Wimbleton v. Holdrip*, 1 Lev. 303. *Woodcock v. Cole*, 1 Sid. 215. *Stone v. Bliss*, 1 Bulst. 43. *Fitzpatrick v. Robinson*, 1 Show. 1. *Austin v. Jervoise*, Hob. 69, 77. *Brown v. Rands*, 2 Vent. 156. *Lord Evers v. Buckton*, Benl. 65. *Braban v. Bacon*, Cro. Eliz. 916. *Codner v. Dalby*, Cro. Jac. 363. *Leneret v. Rivet*, *ibid.* 503; 1 Wms. Saund., 116, n., (1). *Barker v. Thorold*, 1 Saund. 47. *Varley v. Manton*, 9 Bing. 363.

of an annuity, the defendant pleaded that on that day, he did offer to show a sufficient discharge. And it was adjudged, that the plea was insufficient, "for his plea ought to have alleged what manner of discharge he offered to show, viz. a release or other matter of discharge, upon which the court might judge if it was sufficient or not; for the country shall not inquire of it, but it ought to be adjudged by the court; which the judges cannot do, if the special matter be not showed to them." (a) So in debt on bond conditioned for the payment of 30*l.* to *H. S.*, *I. S.*, and *A. S.* tam cito as they should come to the age of twenty-one years, the defendant pleaded that he paid those sums tam cito as they came of age, and the plaintiff demurred because it was not shown when they came of age, and the certain times of the payment. "And * for this [*372] cause all the court held the plea to be ill, for although it be a good plea regularly to the condition of a bond, to pursue the words of the condition and to show the performance, yet Coke said there was another rule, that he ought to plead in certainty the time, place, and manner of the performance of the condition, so as a certain issue may be taken: otherwise it is not good. Wherefore because he did not plead here in certainty, it was adjudged for the plaintiff. And between the same parties in another action of debt upon an obligation, the condition being for the performance of legacies in such a will, he pleading performance generally, and not showing the will nor what the legacies were, it was adjudged for the plaintiff." (b) So in debt on a bond conditioned for the performance of several specific

(a) Lord Lisle's case, cited 9 Rep. 25 a. See also *Lloyd v. Wood*, 5 A. & E. 228.

(b) *Halsley v. Carpenter*, Cro. Jac. 359.

things, "the defendant pleaded *performavit omnia*, &c. Upon demurrer it was adjudged an ill plea; for the particulars being expressed in the condition, he ought to plead to each particularly by itself." (c)

Yet this rule requiring performance to be specially shown, admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity; and a more general mode of allegation [*373] is in such cases allowable. It is *open also to the following exceptions. Where the condition is for the performance of matters set forth in another instrument, and these matters are in an affirmative and absolute form, and neither in the negative nor the disjunctive, a general plea of performance is sufficient. And where a bond is conditioned for indemnifying the plaintiff from the consequences of a certain act, a general plea of *non damnificatus*, viz. that he has not been damnified, is proper, without showing how the defendant has indemnified him. These variations from the ordinary rule and the principles on which they are founded, will be explained hereafter. (d)

When in any of these excepted cases, however, a general plea of performance is pleaded, the rule under discussion still requires the *plaintiff* to show particularly in his replication, in what way the covenant or condition has been *broken*; for otherwise no sufficiently certain issue would be attained. Thus in an action of debt on a bond conditioned for performance of affirma-

(c) *Wimbleton v. Holdrip*, 1 Lev. 303. [*Roakes v. Manser*, 1 C. B. 531. *Kepp v. Wiggett*, 6 C. B. 280. In *Roakes v. Manser*, Coltman, J. (at p. 542) said the plea would be bad on general demurrer.]

(d) See Index to this work, tit. Performance. A general allegation of performance in the declaration is sufficient on general demurrer. *Kemble v. Mills*, 1 M. & G. 757. *Procter v. Sargent*, 2 M. & G. 20. [But see note (c) ante.]

tive and absolute covenants contained in a certain indenture, if the defendant pleads generally (as in that case he may), that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue * with a mere traverse [*374] of the words of the plea, viz. that the defendant did not perform any of the covenants, &c.; for this issue would be too wide and uncertain: but he must assign a breach, showing specifically in what particular, and in what manner, the covenants have been broken. (e)

Not only on the subject of *performance*, but in a variety of other cases, the books afford illustration of this general rule. (f)

Thus, where the plaintiff described himself in his declaration as the Earl of Stirling, and the defendant pleaded that the plaintiff was not Earl of Stirling, to which the plaintiff replied that he was Earl of Stirling, — this was held insufficient without showing *how* he claimed the dignity, — for * unless this [*375] were shown, it would not appear what was the proper form of trial for the issue, whether by the record of parliament, or by the country. (g)

(e) *Plomer v. Ross*, 5 Taunt. 386; per Lord Mansfield, *Sayre v. Minns*, Cowp. 578; Com. Dig. Pleader, (F. 14). [See also *Roakes v. Manser*, 1 C. B. 531]

(f) For instances of what is, or is not sufficient certainty in the declaration, see *Dixon v. Fletcher*, 3 M. & W. 146. *Lewis v. Parkes*, *ibid.* 133. *Parrett Navigation Company v. Stower*, 6 M. & W. 564; 8 Dowl. 405, S. C. *Hinde v. Gray*, 1 M. & G. 195. *France v. White*, 1 M. & G. 731. *Riseley v. Ryle*, 1 Dowl. N. S. 660. In the plea, *West v. Turner*, 6 A. & E. 614. *Cowan v. Braidwood*, 1 M. & G. 882. *Bowler v. Nicholson*, 12 A. & E. 341; 4 P. & D. 16, S. C. *Rutter v. Chapman*, 8 M. & W. 83, 84. *Pitt v. Chappelow*, *ibid.* 616. *Deacon v. Stodhart*, 5 Bing. N. C. 594. *Harden v. Clifton*, 1 G. & D. 22; 1 Q. B. 522, S. C. *Ashton v. Freestun*, 2 M. & G. 1. *Dunn v. Di Nuovo*, 3 Scott's N. R. 487; 9 Dowl. 841, S. C.

(g) *Earl of Stirling v. Clayton*, 1 Crompt. & Mee. 241.

So in debt on bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract, made at a time and place specified, between the plaintiff and defendant, — whereupon there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court held that the plea was bad for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J. observed, that he had “always understood that the party who pleads a contract must set it out, if he be a party to the contract.” (*h*)

To an action on the case for a libel, imputing that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving [*376] ing and defrauding divers persons, the *defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned with, and was one of a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assigning for cause *inter alia* that the plea did not state the *particular instances of fraud*; and though

Davis v. Holding, 11 A. & E. 710; 3 P. & D. 413, S. C. In replication, *Ferguson v. Mahon*, 11 A. & E. 179. *Turquand v. Mosedon*, 7 M. & W. 504; 9 Dowl. 282, S. C.

(*h*) *Hill v. Montagu*, 2 M. & S. 377. *Hinton v. Roffey*, 3 Mod. 35, S. P. [In *Kempe v. Gibbon*, 12 Q. B. 662, the plaintiff replied to a plea of the Statute of Limitations a written acknowledgment. On special demurrer it was held unnecessary to set out the writing.]

the Court of Common Pleas gave judgment for the defendant, this judgment was afterwards reversed upon writ of error and the plea adjudged to be insufficient on the ground above mentioned. (*i*)

In an action of trespass for false imprisonment the defendants pleaded, that before the said time when, &c. certain persons unknown had forged receipts on certain forged dividend warrants and received the money purporting to be due thereon in Bank of England notes, amongst which was a note for £100, which was afterwards exchanged at the Bank for other notes,— amongst which was one for £10, the date and number of which was afterwards altered; that afterwards and a little before the said time when, &c. the plaintiff was *suspiciously* possessed of the altered note, and did in a *suspicious* manner dispose of the same to one

* *A. B.*, and afterwards in a *suspicious* manner [*377] left England and went to Scotland; whereupon the defendants had *reasonable cause to suspect* and did suspect, that the plaintiff had forged the said receipts; and so proceeded to justify the taking and detaining his person to be dealt with according to law. Upon general demurrer this plea was considered as clearly bad, because it did not show the *grounds* of suspicion with sufficient certainty to enable the court to judge of their sufficiency; and it was held that the use of the word *suspiciously* would not compensate that omission. (*k*)

In an action of trover for taking a ship, the defendant pleaded that he was captain of a certain man-of-war, and that he seized the ship mentioned in the

(*i*) *J'Anson v. Stuart*, 1 T. R. 748. See also *Holmes v. Catesby*, 1 Taunt. 543. *Hickinbotham v. Leach*, 10 M. & W. 361; 2 Dowl. N. S. 270, S. C.

(*k*) *Mure v. Kaye*, 4 Taunt. 34.

declaration, as prize; that he carried her to a certain port in the East Indies; and that the admiralty court there gave sentence against the said ship as prize. Upon demurrer, it was resolved, that it was necessary for the plea to show some special cause for which the ship became a prize; and that the defendant ought to show who was the judge that gave sentence, and to whom that court of admiralty did belong. And for the omission of these matters the plea was adjudged insufficient. (l)

[*378] * In an action of debt on bond, conditioned to pay so much money yearly, while certain letters patent were in force, the defendant pleaded, that from such a time to such a time, he did pay; and that then the letters patent became void, and of no force. The plaintiff having replied, it was adjudged, on demurrer to the replication, that the plea was bad; because it did not show *how* the letters patent became void. (m)

Where the defendant justified an imprisonment of the plaintiff, on the ground of a contempt committed *tam factis quam verbis*, the plea was held bad upon demurrer, because it set forth the contempt in this general way, without showing its nature more particularly. (n)

With respect to all points on which certainty of allegation is required, it may be remarked, in general, that the allegation, when brought into issue, requires to be proved in substance as laid; and that the relaxation

(l) *Beak v. Tyrrell*, Carth. 81.

(m) *Lewis v. Preston*, 1 Show. 290; Skin. 303, S. C.

(n) *Collet v. The Bailiffs of Shrewsbury*, 2 Leo. 34. [In *Burgess v. Beaumont*, 7 M. & G. 962, assumpsit by a governess for breach of a contract to employ her, it was pleaded that after the contract the defendant discovered that the plaintiff was an immoral and dishonest person, unfit and improper for the situation of governess. This plea was held bad on special demurrer as too general.]

from the ordinary rule on this subject, which is allowed with respect to *time*, *quantity* and *value*, does not, generally speaking, extend to other particulars.

Such are the principal rules which tend to *certainty;—but it is to be observed, that [*379] these receive considerable *limitation* and *restriction* from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed.

1. *It is not necessary in pleading to state that which is merely matter of evidence. (o)*

In other words, it is not necessary, in alleging a fact, to state such circumstances as merely tend to prove the truth of the fact. This rule may be illustrated by the following cases.

In an action of replevin for 70 cocks of wheat, the defendant avowed under a distress for rent arrear. The plaintiff pleaded in bar, that before the said time when, &c., one *H. L.* had recovered judgment against *G. S.*, and sued out execution; that *G. S.* was tenant at will to the defendant, and had sown seven acres of the premises with wheat, and died possessed thereof as tenant at will;—that after his death the sheriff took the said wheat *in execution, [*380] and sold it to the plaintiff;—that the plaintiff suffered the wheat to grow on the locus in quo till

(o) “Evidence shall never be pleaded, because it tends to prove matter in fact; and, therefore, the matter in fact shall be pleaded.” Dowman’s case, 9 Rep. 9 b.; and see 9 Edw. III. 5 b. 6 a. there cited. (See also 18 E. II., 614, where the pleader objects to an allegation, *ceo n’est forsque un evidence a l’enqueste.*) *Eaton v. Southby*, Willes, 131. *Jermy v. Jenny*, Raym. 8. *Groenvelt v. Burnell*, Carth. 491. *Digby v. Alexander*, 8 Bing. 416. *Martin v. Smith*, 6 East, 563. Per Denman, C. J., in *Williams v. Wilcox*, 8 A. & E. 331. *Baynes v. Brewster*, 1 G. & D. 674.

it was ripe and fit to be cut;—that he afterwards cut it and made it into cocks, whereof the said 70 cocks were parcel;—that the said cocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same, in the course of husbandry, were fit to be carried away;—and that while they were so lying, the defendant, of his own wrong, took and distrained the same, under pretence of a distress, the said wheat not then being fit to be carried away, according to the course of husbandry, &c. The defendant demurred; and among other objections, urged that it ought to have been particularly shown how long the wheat remained on the land after the cutting, that the court might judge whether it were a reasonable time or not. But the court decided against the objection. “For though it is said, in Co. Litt. 56 b., that in some cases the *court* must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice, or the like, it is absurd to say, that in the present case the court must judge of the reasonableness; for if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion, *therefore, that this matter is sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury,—who, upon hearing the evidence, would have been the proper judges of it.” (*p*) So in an action brought against the defendant by the name of Alexander Humphreys Alexander, he pleaded in abatement that the king by his proclama-

(*p*) *Eaton v. Southby*, Willes, 131. See also *Elliott v. Hardy*, 3 Bing. 61.

tion assembled the peers of Scotland to elect a peer to sit in parliament; that they did assemble accordingly, and that the defendant there claimed to vote as *Earl of Stirling*; that his vote was taken by the clerks of session, and that he voted for a nobleman who afterwards took his seat in the house of peers; and then, after stating another similar occasion on which he had given his vote, he proceeded with this allegation. "And so the defendant says, that at the time of issuing the writ he was and is Earl of Stirling," and he concluded with a traverse, denying that he was named Alexander Humphreys Alexander, as in the declaration supposed. The court, on demurrer, held this plea to be bad, and Alderson, J., observed, that it contained nothing but evidence for a jury. (q)

The reason of this rule is evident, if we revert *to the general object which all the [*382] rules tending to certainty contemplate, — viz. the attainment of a certain issue. This implies (as has been shown) a development of the question in controversy in a specific shape; and the *degree* of specification with which this should be developed, it has been elsewhere attempted, in a general way, to define. (r) But, so that that object be attained, there is, in general, no necessity for further minuteness in the pleading: and therefore those subordinate facts which go to make up the evidence by which the affirmative or negative of the issue is to be established, do not require to be alleged, and may be brought forward, for the first time, at the trial, when the issue comes to be decided. Thus, in the above example, if we suppose the issue joined, whether the wheat cut was afterwards suffered

(q) *Digby v. Alexander*, 8 Bing. 416.

(r) See *supra*, * pp. 144, 147.

to lie on the ground a reasonable time or not, there would have been sufficient certainty, without showing on the pleadings, any of those circumstances (such as the number of days, the state of the weather, &c.,) which ought to enter into the consideration of that question. These circumstances, being matter of evidence only, ought to be proved before the jury, but need not appear on the record.

This is a rule, so elementary in its kind, [*383] and so *well observed in practice, as not to have become very frequently the subject of illustration by decided cases; and (for that reason probably) is little, if at all noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail, in which the allegations, under other systems of judicature are involved.

Another rule, that much conduces to the same effect, is, that,

*2. *It is not necessary to state matter of which the court takes notice ex officio.* (s)

Therefore, it is unnecessary to state *matter of law*; (t) for this the judges are bound to know, and can apply for themselves to the facts alleged. Thus, if it be stated in pleading, that an officer of a corporate body was removed for misconduct by the corporate body at large, it

(s) Co. Litt. 308 b.; Com. Dig. Pleader, (C. 78); Deybel's case, 4 Barn. & Ald. 243.

(t) Doct. Pl. 102. Per Buller, J., *The King v. Lyme Regis*, Doug. 159.

is unnecessary to aver that the power of removal was vested in such corporate body ; because that is a power by law * incidental to them, unless [*384] given by some charter, by-law, or other authority, to a select party only. (u) Nor is it the principles of the *common law* alone, which it is unnecessary to state in pleading. The *public statute law* falls within the same reason and the same rule ; as the judges are bound, officially, to notice the tenor of every public act of parliament. (v) It is, therefore, never necessary to set forth a public statute. (w) The case, however, of *private* acts of parliament is different ; for these the court does not officially notice ; (x) and therefore, where a party has occasion to rely on an act of this description, he must set forth such parts of it as are material. (y)

It may be observed, however, that though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, in an action of assumpsit it is very common to state that the defendant, under the particular circumstances set forth in the declaration, *became liable* to pay ; and being so liable, in consideration thereof promised to pay. So it is sometimes necessary to refer to a public * statute in general terms, to show that [*385] the case is intended to be brought within the statute ; as, for example, to allege that the defendant committed a certain act *against the form of the statute in*

(u) *The King v. Lyme Regis*, Doug. 148.

(v) 1 Bl. Com. 85.

(w) *Boyce v. Whitaker*, Doug. 97. *Partridge v. Strange*, Plow. 84.

(x) 1 Bl. Com. *ibid.* *Platt v. Hill*, *Ld. Raym.* 331.

(y) *Boyce v. Whitaker*, Doug. 97.

such case made and provided; (z) but the reference is made in this general way only, and there is no need to set the statute forth.

This rule, by which matter of law is omitted in the pleadings, by no means prevents (it will be observed) the attainment of the requisite certainty of issue. For even though the dispute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description, without any *allegation* of law; for *ex facto jus oritur*, that is, every question of law necessarily arises out of some given state of facts; and therefore nothing more is necessary than for each party to state alternately his case in point of fact: and upon demurrer to the sufficiency of some one of these pleadings, the issue in law must at length (as formerly demonstrated) arise.

As it is unnecessary to allege matter of law, so, if it be alleged, it is improper (as it has been elsewhere stated) to make it the subject of traverse. (a)

[*386] * Besides points of *law*, there are many other matters of a public kind, of which the court takes official notice, and with respect to which it is, for the same reason, unnecessary to make allegation in pleading; such as matters antecedently alleged in the same record, (b) — the time of the king's accession, — his proclamations, — his privileges, — the time and place of holding parliament, — the time of its sessions and prorogations, and its usual course of proceeding, — the ecclesiastical, civil, and maritime laws, — the cus-

(z) As to the cases in which it is necessary to allege *contra formam statuti*, see *Wells v. Iggulden*, 3 Barn. & Cress. 186. *Peate v. Dicken*, 5 Tyrw. 116. [*Fife v. Bousfield*, 6 Q. B. 100.]

(a) Vide *suprà*, * p. 220.

(b) Co. Litt. 303 b. *The King v. Knollys, Ld.* Raym. 13.

tomary course of descent in gavel-kind and borough-English tenure, — the course of the almanac, (c) — the division of England into counties, (d) — provinces and dioceses, — the meaning of English words and terms of art, even when only local in their use, — legal weights and measures, and the ordinary measurement of time, — the existence and course of proceeding of the superior courts at Westminster and the other courts of general jurisdiction, — and the privileges of the officers of the courts at Westminster. (e)

*3. *It is not necessary to state matter which would* [*387] *come more properly from the other side.* (f)

This, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, C. J., is “like leaping before one comes to the stile.” (g) It is sufficient that each pleading should in itself contain a good *primâ facie* case, without reference to possible objections not yet urged. Thus, in pleading a devise of land by force of

(c) But see *Mayor of Guildford v. Clarke*, 2 Vent. 247.

(d) *Rippon v. Dawson*, 5 Bing. N. C. 206. But not the local situation and distances of the different places in a county from each other. *Deybel's case*, 4 Barn. & Ald. 243. *Humphreys v. Budd*, 9 Dowl. 1000. *Brune v. Thompson*, 2 G. & D. 110.

(e) This enumeration is principally taken from 1 Chitty, 214, 6th edit., where further information on the subject will be found. See also *Whyte v. Rose*, 4 P. & D. 199.

(f) Com. Dig. Pleader, (C. 81). *Stowell v. Lord Zouch*, Plow. 37. *Walsingham's case*, *ibid.* 564. *St. John v. St. John*, Hob. 78. *Hotham v. East India Company*, 1 T. R. 638. *Palmer v. Lawson*, 1 Sid. 333. *Lake v. Raw*, Carth. 8. *Williams v. Fowler*, Str. 410. *Pugh v. Griffith*, 7 A. & E. 827; 3 N. & P. 187. *Weeding v. Aldrich*, 9 A. & E. 861. *Wyld v. Pickford*, 8 M. & W. 459. *Grand Junction Railway Company v. White*, 8 M. & W. 214. *Wynne v. Wynne*, 2 M. & G. 8. *Johnson v. Faulkner*, 2 G. & D. 184. [*Ricketts v. Loftus*, 14 Q. B. 482.]

(g) *Sir Ralph Bovey's case*, 1 Vent. 217.

the statute of wills, 32 Hen. VIII. c. 1, it was held sufficient to allege that such an one was seised of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For though the statute provides that wills made by *femes covert*, or persons within age, &c., shall not be taken to be effectual, yet if the devisor were within age, it was for the other party to show this in his answer, (*h*)

[*388] and it needed not be denied by *anticipation. (*i*)

So in a declaration of debt upon a bond, it is unnecessary to allege that the defendant was of full age when he executed. (*k*) So where an action of debt was brought upon the statute 21 Hen. VI. against the bailiff of a town, for not returning the plaintiff a burgess of that town for the last parliament (the words of the statute being that the sheriff shall send his precept to the mayor, and if there be no mayor, then to the bailiff), the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion clearly, that the declaration was good; "for we shall not intend that there was a mayor, except it be showed; and if there were one, it should come more properly on the other side." (*l*) So where there was a covenant in a charter-party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four ship-

(*h*) *Stowell v. Lord Zouch*, Plow. 376.

(*i*) As to the effect of such premature denial in the adversary's pleading, *vide supra*, *p. 276.

(*k*) *Walsingham's case*, Plow. 564. *Sir Ralph Bovey's case*, 1 Vent. 217.

(*l*) *St. John v. St. John*, Hob. 78.

wrights, to be indifferently chosen by both parties ;” and in an action of covenant brought *to [*389] recover for short tonnage, the plaintiff had a verdict ; the defendant moved, in arrest of judgment, that it had not been averred in the declaration that a survey was taken, and short tonnage made to appear. But the court held that if such survey had *not* been taken, this was matter of defence, which ought to have been shown by the defendants, and refused to arrest the judgment. (m)

But where the matter is such that its affirmation or denial is essential to the apparent or *primâ facie* right of the party pleading, there it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side. Thus, in an action of trespass on the case, brought by a commoner against a stranger for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held, on demurrer, to be no good plea ; for though it may be objected that the plaintiff may reply that there was not enough common left, yet as he had already alleged in his declaration that his enjoyment of the common was obstructed, the *contrary of this ought to have [*390] been shown by the plea. (n)

There is an exception to the rule in question, in the case of certain pleas which are regarded unfavourably

(m) *Hotham v. East India Company*, 1 T. R. 638. [So in *Laurie v. Bendall*, 12 Q. B. 634, and *Palk v. Force*, 12 Q. B. 666, it was held that a pleader relying on a statute need not negative exceptions in the statute.]

(n) *Smith v. Feverell*, 2 Mod. 6 ; 1 Freeman, 190. S. C. *Greenhow v. Halsey*, Willes, 619.

by the courts, as having the effect of excluding the truth. Such are all pleadings in *estoppel*,^(o) and the plea of *alien enemy*. It is said that these must be *certain in every particular*; which seems to amount to this, that they must meet and remove by anticipation every possible answer of the adversary. Thus, in a plea of alien enemy, the defendant must state not only that the plaintiff was born in a foreign country, now at enmity with the king, but that he came here without letters of safe conduct from the king;^(p) whereas, according to the general rule in question, such safe conduct, if granted, should be averred by the plaintiff in reply, and would not need in the first instance to be denied by the defendant.

4. *It is not necessary to allege circumstances necessarily implied.*^(q)

[*391] *Thus, in an action of debt on a bond conditioned to stand to and perform the award of *W. R.*, the defendant pleaded that *W. R.* made no award. The plaintiff replied, that after the making of the bond, and before the time for making the award, the defendant, by his certain writing, revoked the authority of the said *W. R.*, contrary to the form and effect of the said condition. Upon demurrer, it was held that this replication was good, without averring that *W. R.* had notice of the revocation; because that was implied in the words "revoked the authority;" for there could be no revocation without notice to the arbitrator; so

(o) Co. Litt. 352 b., 303 a. *Dovaston v. Payne*, 2 H. Bl. 530.

(p) *Casseres v. Bell*, 8 T. R. 166.

(q) *Vynior's case*, 8 Rep. 81 b.; Bac. Ab. Pleas, &c. (I. 7); Com. Dig. Pleader, (E. 9); Co. Litt. 303 b.; 2 Wms. Saund. 305 a., n. (13); Reg. Plac. 101. *Sheers v. Brooks*, 2 H. Bl. 120. *Handford v. Palmer*, 2 Brod. & Bing. 361. *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

that if *W. R.* had no notice, it would have been competent to the defendant to tender issue, "that he did not revoke in manner and form as alleged."^(r) So if a feoffment be pleaded, it is not necessary to allege livery of seisin, for it is implied in the word "enfeoffed."^(s) So if a man plead that he is heir to *A.*, he need not allege that *A.* is dead, for it is implied.^(t)

5. *It is not necessary to allege what the law will presume.* (*u*)

* Thus, in debt on a replevin bond, the plaintiff declared that at the city of *C.* and within the jurisdiction of the mayor of the city, they distrained the goods of *W. H.* for rent, and that *W. H.* at the said city made his plaint to the mayor, &c., and prayed deliverance, &c., — whereupon the mayor took from him and the defendant the bond on which the action was brought, conditioned that *W. H.* should appear before the mayor or his deputy at the next court of record of the city; and there prosecute his suit, &c. : and thereupon the mayor replevied, &c. It was held not to be necessary to allege in the declaration, a custom for the mayor to grant replevin and take bond, and show that the plaint was made in court; because all these circumstances must be *presumed* against the defendant, who executed the bond and had the benefit of the replevin.^(v) So in an action for slander imputing theft, the plaintiff need not aver that he is not a thief,

(*r*) *Vynior's case*, 8 Rep. 81 b. *Marsh v. Bulteel*, 5 Barn. & Ald. 507, S. P.

(*s*) Co. Litt. 303 b.; Doct. Pl. 48, 49; 2 Wms. Saund. 305 a., n. (13).

(*t*) 2 Wms. Saund. 305 a., n. (13); Com. Dig. Pleader, (E. 9); Dal. 67.

(*u*) *Wilson v. Hobday*, 4 M. & S. 125. *Chapman v. Pickersgill*, 2 Wils. 147; 1 Chitty, 221, 6th edit.

(*v*) *Wilson v. Hobday*, 4 M. & S. 125.

because the law presumes his innocence, till the contrary be shown. (*w*)

6. *A general mode of pleading is allowed where great proximity is thereby avoided.* (*x*)

[*393] *It has been objected with truth that this rule is indefinite in its form. (*y*) Its extent and application, however, may be collected with some degree of precision from the examples by which it is illustrated in the books, and by considering the limitations which it necessarily receives from the rules tending to certainty, as enumerated in a former part of this section.

In *assumpsit*, on a promise by the defendant to pay for all such necessities as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessities amounting to such a sum. It was moved in arrest of judgment that the declaration was not good, because he had not shown what necessities in particular he had provided. But Coke, C. J., said, "this is good as is here pleaded, for avoiding such multiplicities of reckonings;" and Doddridge, J., "this general allegation that he had provided him with all necessities is good, without showing in particular what they were." And the court gave judgment unani-

(*w*) *Chapman v. Pickersgill*, 2 Wms. 147; 1 Chitty, 221, 6th edit.

(*x*) Co. Litt. 303 b.; 2 Saund. 116 b., 411, n. (4); Bac. Ab. Pleas, &c. (I. 8). *Jermy v. Jenny*, Raym. 8. *Aglionby v. Towerson*, Raym. 400. *Parkes v. Middleton*, Lutw. 421. *Keating v. Irish*, 590. *Cornwallis v. Savery*, 2 Burr. 772. *Mints v. Bethil*, Cro. Eliz. 749. *Braban* [*393] **v. Bacon*, 916. *Church v. Brownwick*, 1 Sid. 334. *Cryps v. Baynton*, 3 Bulst. 81. *Banks v. Pratt*, Sty. 428. *Huggins v. Wiseman*, Carth. 110. *Groenvelt v. Burnell*, 491. *J'Anson v. Stuart*, 1 T. R. 753. *Shum v. Farrington*, 1 Bos. & Pul. 640. *Barton v. Webb*, 8 T. R. 459. *Hill v. Montagu*, 2 M. & S. 878. *Denison v. Richardson*, 14 East, 291.

(*y*) 1 Arch. 211.

mously for the plaintiff. (z) So in assumpsit *for labour and medicines for curing the de- [*394] fendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries generally. On demurrer to the replication, it was objected that the plaintiff had not assigned in certain, how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good; and the plaintiff had judgment. (a) So in debt on a bond conditioned that the defendant shall pay from time to time the moiety of all such money as he shall receive, and give account of it, — he pleaded generally that he had paid the moiety of all such money, &c. Et per curiam, “This plea of payment is good without showing the particular sums; and that, in order to avoid stuffing the rolls with multiplicity of matter.” Also they agreed that, if the condition had been to pay the moiety of such money as he should receive, without saying *from time to time*, the payment should have been pleaded specially. (b)

In an action on a bond, conditioned that *W. W.* who was appointed agent of a regiment, should pay all such sum and sums of money as he should receive from the paymaster-general for the use of the regiment, and faithfully account to and *indemnify the [*395] plaintiff, the defendant pleaded a general performance and that the plaintiff was not damnified. The plaintiff replied that *W. W.* received from the paymaster-general for the use of the said regiment several sums of money amounting in the whole to £1400, for

(z) *Cryps v. Baynton*, 3 Bulst. 31.

(a) *Huggins v. Wiseman*, Carth. 110.

(b) *Church v. Brownwick*, 1 Sid. 334; and see *Mints v. Bethil*, Cro. Eliz. 749.

and on account of the said regiment, and of the commissioned and non-commissioned officers and soldiers of the same, according to their respective proportions, and that he had not paid a great part thereof among the colonel, officers, and soldiers, &c., according to the several proportions of their pay. Upon demurrer the court said, that "there was no need to spin out the proceedings to a great prolixity, by entering into the detail, and stating the various deductions out of the whole pay, upon various accounts and in different proportions." (c) So, in debt on bond conditioned that *R. S.* should render to the plaintiff a just account, and make payment and delivery of all monies, bills, &c., which he should receive as his agent—the defendant pleaded performance. The plaintiff replied that *R. S.* received as such agent divers sums of money amounting to £2000, belonging to the plaintiff's business, and had not rendered a just account nor made payment and delivery of the said sum or any part thereof. The defendant demurred specially, assigning for [*396] *cause, that it did not appear by the replication, from whom or in what manner, or in what proportions, the said sums of money amounting to £2000 had been received. But the court held the replication "agreeable to the rules of law, and precedents." (d)

7. *A general mode of pleading is often sufficient, where the allegation on the other side must reduce the matter to certainty.* (e)

(c) *Cornwallis v. Savery*, 2 Burr. 772.

(d) *Shum v. Farrington*, 1 Bos. & Pul. 640; and see a similar decision, *Burton v. Webb*, 8 T. R. 459.

(e) Co. Litt. 303 b. *Mints v. Bethil*, Cro. Eliz. 749; 1 Saund. 117, n. (1); 2 Saund. 410, n. (3). *Church v. Brownwick*, 1 Sid. 334.

This rule comes into most frequent illustration in pleading *performance in actions of debt on bond*. It has been seen that the general rule as to certainty, requires that the time and manner of such performance should be especially shown. (*f*) Nevertheless by virtue of the rule now under consideration, it may be sometimes alleged in general terms only;—and the requisite certainty of issue is in such cases secured, by throwing on the plaintiff the necessity of showing a special breach in his replication. This course, for example, is allowed in cases where a more special form of pleading would lead to inconvenient prolixity. Thus, in debt on bond conditioned that the defendant should at all * times, upon request, deliver to the [*397] plaintiff all the fat and tallow of all beasts which he, his servants or assigns, should kill or dress before such a day,—the defendant pleaded, that upon every request made unto him, he delivered unto the plaintiff all the fat and tallow of all beasts which were killed by him, or any of his servants or assigns, before the said day. On demurrer it was objected, “that the plea was not good in such generality; but he ought to have said that he had delivered so much fat or tallow, which was all, &c.—or that he had killed so many beasts, whereof he had delivered all the fat.” But the court held “that the plea was good, for where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be encumbered with the length thereof, the law allows of a general pleading in the affirmative. And it hath been resolved by all the justices of England, that in debt upon an obligation to perform the covenants in an indenture, it sufficeth

(*f*) *Supra*, * p. 371.

to allege performance generally. So, where one is obliged to deliver all his evidences, or to assure all his lands, it sufficeth to allege that he had delivered all, &c. or assured all his lands; and it ought to come on the other side, to show the contrary in some particular." (g)

[*398] * Another illustration is afforded by the plea of *non damnificatus*, in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," &c. This is in the nature of a plea of performance; being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms without showing the particular manner of the indemnification. Thus, if an action of debt be brought on a bond, conditioned that the defendant "do from time to time acquit, discharge, and save harmless, the churchwardens of the parish of *P.*, and their successors, &c. from all manner of costs and charges, by reason of the birth and maintenance of a certain child," — if the defendant means to rely on the performance of the condition, he may plead in this general form, — "that the churchwardens of the said parish, or their successors, &c. from the time of making the said writing obligatory, were not in any manner damnified by reason of the birth or maintenance of the said child;" (h) and it will then be for the plaintiff to show in the replication, how the churchwardens were damnified. But with respect to

(g) *Mints v. Bethil*, Cro. Eliz. 749; and see *Church v. Brownwick*, 1 Sid. 334.

(h) *Richards v. Hodges*, 2 Saund. 84. *Hayes v. Bryant*, 1 H. Bl. 253; Com. Dig. Pleader, (E. 25), (2 W. 33); *Manser's case*, 2 Rep. 4 a.; 7 Went. Index, 615; 5 Went. 531.

the plea of *non damnificatus*, the following distinctions have been taken. — First, * if, instead [*399] of pleading in that form, the defendant alleges affirmatively, that he has “saved harmless,” &c., the plea will in this case be bad, unless he proceeds to show specifically *how* he saved harmless. (i) Again, it is held that if the condition does not use the words “indemnify,” or “save harmless,” or some equivalent term, but stipulates for the performance of some *specific act*, intended to be by way of indemnity, such as the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff’s liability to pay the same sum, — the plea of *non damnificatus* will be improper; and the defendant should plead performance specifically, as “that he paid the said sum,” &c. (k) It is also laid down that if the condition of the bond be to “discharge” or “acquit” the plaintiff from a particular thing, the plea of *non damnificatus* will not apply; but the defendant must plead performance specially, — “that he discharged and acquitted,” &c. — and must also show the manner of such acquittal and discharge. (l) But, on the other hand, if a bond be conditioned to “discharge and acquit the plaintiff *from any damage*” by reason of a certain thing, *non damnificatus* may then be * pleaded, — because that is in truth the same [*400] thing with a condition to “indemnify and save harmless,” &c. (m)

The rule under consideration is also exemplified in

(i) 1 Saund. 117, n. (1). *White v. Cleaver*, Str. 681; vide *supra*, *p. 371.

(k) *Holmes v. Rhodes*, 1 Bos. & Pul. 638.

(l) 1 Saund. 117, n. (1). *Brett v. Audar*, 1 Leon. 71. *White v. Cleaver*, Str. 681. *Leneret v. Rivet*, Cro. Jac. 503. *Harris v. Pett*, 5 Mod. 243; Carth. 375, S. C.

(m) 1 Saund. 117, n. (1).

the case where the condition of a bond is for performance of covenants, or other matters, *contained in an indenture, or other instrument collateral to the bond, and not set forth in the condition*. In this case also the law often allows (upon the same principle as in the last) a general plea of performance, without setting forth the manner. (n) Thus, in an action of debt on bond, where the condition is, that *T. J.*, deputy-postmaster of a certain stage, “shall and will truly, faithfully, and diligently, do, execute, and perform all and every the duties belonging to the said office of deputy-postmaster of the said stage, and shall faithfully, justly, and exactly observe, perform, fulfil, and keep all and every the instructions, &c. from his Majesty’s postmaster-general,” — and such instructions are in an affirmative and absolute form, as follows — “you shall cause all letters and packets to be speedily and without delay carefully and faithfully delivered, that shall from time to time be sent [*401] unto your said stage, to be dispersed * there, or in towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers,” &c. — it is sufficient for the defendant to plead (after setting forth the instructions), “that the said *T. J.* from the time of the making the said writing obligatory, hitherto hath well, truly, faithfully and diligently done, executed, and performed, all and every the duties belonging to the said office of deputy-postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, &c., according to the true intent and meaning of the said instructions,” without showing

(n) *Mints v. Bethil*, Cro. Eliz. 749; Bac. Ab. Pleas, &c. (I. 8); 2 Saund. 410, n. (3); 1 Saund. 117, n. (1); Com. Dig. Pleader, (2 V. 13). *Earl of Kerry v. Baxter*, 4 East, 340.

the manner of performance, — as that he did cause certain letters or packets to be delivered, &c., being all that were sent. (*o*) So, if a bond be conditioned for fulfilling all and singular the covenants, articles, clauses, provisoes, conditions and agreements, comprised in a certain indenture, on the part and behalf of the defendant, which indenture contains covenants of an affirmative and absolute kind only, — it is sufficient to plead (after setting forth the indenture) that the defendant always hitherto hath well and truly fulfilled all and singular the covenants, articles, clauses, provisoes, conditions, and agreements, comprised in the said indenture, on the part and behalf of the said defendant. (*p*)

* But the adoption of a mode of pleading so [*402] general as in these examples, will be improper where the covenants or other matters mentioned in the collateral instrument are either in the *negative* or the *disjunctive* form ; (*q*) and with respect to such matters, the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. Thus in the example above given, of a bond conditioned for the performance of the duties of a deputy-postmaster, and for observing the instructions of the postmaster-general, if, besides those in the *positive* form, some of these instructions were in the *negative*, as for example, “you shall not receive any letters or packets directed to any seaman, or unto any private soldier, &c. unless you be first paid for the same, and do charge the same to your account as paid,”

(*o*) 2 Saund. 408 b. 410, n. (8).

(*p*) Gainsford v. Griffith, 1 Saund. 55, 117 n. (1). Earl of Kerry v. Baxter, 4 East, 340 ; 3 Chitty, 872, 6th edit.

(*q*) Earl of Kerry v. Baxter, 4 East, 340. Oglethorp v. Hyde, Cro. Eliz. 233. Lord Arlington v. Merricke, 2 Saund. 410, and note (8), *ibid*.

it would be improper to plead merely that *T. J.* faithfully performed the duties belonging to the office, &c. and all and every the instructions, &c. Such plea will apply sufficiently to the positive, but not to the negative part of the instructions. (r) The form therefore should be as follows; — “That the said *T. J.* from the time of making the said writing obligatory [*403] hitherto, hath well, truly, faithfully, * and diligently executed and performed all and every the duties belonging to the said office of deputy-postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, &c. according to the true intent and meaning of the said instructions. And the said defendant further says, that the said *T. J.* from the time aforesaid did not receive any letters or packets directed to any seaman or private soldier, &c. unless he, the said *T. J.* was first paid for the same, and did so charge himself in his account with the same as paid,” &c. (s). And the case is the same where the matters mentioned in the collateral instrument are in the *disjunctive* or *alternative* form; as where the defendant engages to do either one thing or another. Here also a general allegation of performance is insufficient, and he should show which of the alternative acts was performed. (t)

The reasons why the general allegation of performance does not properly apply to negative or disjunctive matters, are, that in the first case the plea would be indirect or *argumentative* in its form — in the second, equivocal; and would in either case, therefore,

(r) *Lord Arlington v. Merricke*, 2 Saund. 410, and note (3), *ibid.*

(s) 2 Saund. 410, n. (3).

(t) *Oglethorp v. Hyde*, Cro. Eliz. 233.

be objectionable in reference to * certain rules [*404] of pleading, which we shall have occasion to consider in the next section.

It has been stated in a former part of this work, (u) that where a party founds his answer upon any matter not set forth by his adversary, but contained in a deed, of which the latter makes profert, he must demand *oyer* of such deed, and set it forth. In pleading performance, therefore, of the condition of a bond, where (as is generally the case) the plaintiff has stated in his declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand *oyer* of the condition, and set it forth. (x) And where the condition is for performance of matters contained in a *collateral* instrument, it is necessary not only to do this, but also to make profert, and set forth the whole substance of the collateral instrument; (y) for otherwise, it will not appear that that instrument did not stipulate for the performance of negative or disjunctive matter; (z) and in that case the general plea of performance of the matters therein contained would (as above shown) be improper.

8. *No greater particularity is required than the nature of the thing pleaded will conveniently admit.* (a)

* Thus, though generally in an action for [*405] injury to goods, the *quantity* of the goods must

(u) *Suprà*, * p. 76.

(x) 2 Saund. 410, n. (2).

(y) *Ibid.*

(z) See *Earl of Kerry v. Baxter*, 4 East, 340.

(a) Bac. Ab. Pleas, &c. (B. 5), 5; and p. 409, 5th ed. *Buckley v. *Rice Thomas*, Flow. 118. *Wimbish v. Tailbois*, *ibid.* 54, [*405] 55. *Partridge v. Strange*, *ibid.* 85. *Hartley v. Herring*, 8 T. R. 130. *Elliott v. Hardy*, 3 Bing. 61.

be stated, (b) yet if they cannot under the circumstances of the case be conveniently ascertained by number, weight or measure, such certainty will not be required. Accordingly in trespass for breaking the plaintiff's close with beasts, and eating his peas, a declaration not showing the quantity of peas, has been held sufficient, "because nobody can measure the peas that beasts can eat." (c) So in an action on the case for setting a house on fire, per quod the plaintiff amongst divers other goods, *ornatus pro equis amisit*; after verdict for the plaintiff it was objected that this was uncertain; but the objection was disallowed by the court. And in this case Windham, J. said, that if he had mentioned only *diversa bona*, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt; and added, that to avoid prolixity, the law will sometimes allow such a declaration. (d) So in an action of debt brought on the statute 23 Hen. VI. c. 15, against the sheriff of Anglesea for not returning the plaintiff to be a knight of the shire in parliament, the declaration alleged that the [*406] plaintiff * "was chosen and nominated a knight of the same county, &c. by the greater number of men then resident within the said county of Anglesea present, &c., each of whom could dispend 40s. of freehold by the year," &c. On demurrer it was objected, that the plaintiff "does not show the certainty of the number, as to say that he was chosen by 200, which was the greater number, and thereupon a certain issue might arise, whether he was elected by so many or not." But it was held that the declaration was

(b) Vide *suprà*, * p. 332.

(c) *Bac. Ab.* ubi *suprà*.

(d) *Bac. Ab. Pleas*, &c. 409, 5th ed.

“good enough, without showing the number of electors ; for the election might be made by voices or hands, or by such other way wherein it is easy to tell who has the majority, and yet very difficult to know the certain number of them.” And it was laid down, that to put the plaintiff “to declare a certainty, where he cannot by any possibility be presumed to know or remember the certainty, is not reasonable nor requisite in our law.” (e) So in an action for false imprisonment, where the plaintiff declared that the defendant imprisoned him until he made a certain bond by duress, to the defendant “and others unknown,” the declaration was adjudged to be good, without showing the names of the others ; “because it might be that he could not know their names, in which * case the law will not [*407] force him to show that which he cannot.” (f)

8. *Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.* (g).

This rule is exemplified in the case of alleging title in an adversary, where (as formerly explained) a more general statement is allowed than when title is set up in the party himself. (h) So in an action of covenant, the plaintiff declared, that the defendant by indenture demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same, according to the

(e) *Buckley v. Rice Thomas*, Plow. 118.

(f) Cited *ibid.* ; see also *Wimbish v. Tailbois*, Plow. 54, 55. *Partridge v. Strange*, Plow. 85.

(g) *Rider v. Smith*, 3 T. R. 766. *Derisley v. Custance*, 4 T. R. 77. *Attorney-General v. Meller*, Hard. 459. *Denham v. Stephenson*, 1 Salk. 355 ; *Robert Bradshaw's case*, 9 Rep. 60 b. *Gale v. Reed*, 8 East, 80 ; *Com. Dig. Pleader*, (C. 26).

(h) *Vide supra*, * pp. 358, 359.

form and effect of the said indenture; and then the plaintiff assigned a breach that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff it was assigned for error, that he had not in his declaration shown "what person had right, title, estate, or interest in the lands demised, by which it might appear [* 408] * to the court that the defendant had not full power and lawful authority to demise." But upon conference and debate amongst the justices it was resolved, "that the assignment of the breach of covenant was good, for he has followed the words of the covenant negatively; and it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises, than the lessee, who is a stranger to it." (i) So where the defendant had covenanted that he would not carry on the business of a rope-maker, or make cordage for any person, except under contracts for government, and the plaintiff in an action of covenant assigned for breach, that after the making of the indenture, the defendant carried on the business of a rope-maker, and made cordage for divers and very many persons other than by virtue of any contract for government, &c.; the defendant demurred specially, on the ground that the plaintiff "had not disclosed any and what particular person or persons for whom the defendant made cordage, nor any and what particular quantities or kinds of cordage the defendant did so make for them, nor in what manner nor by what acts he carried on the said business of a rope-maker, as is alleged in the said breach of covenant." But [* 409] the court held, "that as the facts * alleged in

(i) Robert Bradshaw's case, 9 Rep. 60 b.

these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiff's, there was no occasion to state them with more particularity," and gave judgment accordingly. (k)

10. *Less particularity is necessary in the statement of matter of inducement or aggravation, than in the main allegations.* (l)

This rule is exemplified in the case of the derivation of title, where, though it is a general rule *that the commencement of a particular estate must be shown*, yet an exception is allowed if the title be alleged by way of *inducement* only. (m) So where in assumpsit, the plaintiff declared that in consideration that at the defendant's request he had given and granted to him, by deed, the next avoidance of a certain church, the defendant promised to pay £100, but the declaration did not set forth any time or place at which such grant was made; upon this being objected in arrest of *judgment, after verdict, the court resolved [* 410] that "it was but an inducement to the action, and, therefore, needed not to be so precisely alleged;" and gave judgment for the plaintiff. (n) So in trespass, the plaintiff declared that the defendant broke and entered his dwelling-house, and "wrenched and forced open, or caused to be wrenched and forced open,

(k) *Gale v. Reed*, 8 East, 80.

(l) Co. Litt. 303 a.; Bac. Ab. Pleas, &c. pp. 322, 348, 5th edit.; Com. Dig. Pleader, (C. 31), (C. 43), (E. 10), (E. 18); Doct. Pl. 283. *Wetherell v. Clerkson*, 12 Mod. 597. *Chamberlain v. Greenfield*, 8 Wils. 292. *Alsop v. Sytwell*, Yelv. 17. *Riggs v. Bullingham*, Cro. Eliz. 715. *Woolaston v. Webb*, Hob. 18. *Bishop of Salisbury's case*, 10 Rep. 59 b.; 1 Saund. 274, n. (1).

(m) Vide *suprà*, *p. 346.

(n) *Riggs v. Bullingham*, Cro. Eliz. 715.

the closet-doors, drawers, chests, cupboards, and cabinets of the said plaintiff." Upon special demurrer it was objected, that the number of closet-doors, drawers, chests, cupboards, and cabinets was not specified. But it was answered, "that the breaking and entering the plaintiff's house was the principal ground and foundation of the present action; and all the rest are not foundations of the action, but matters only thrown in to aggravate the damages, and on that ground need not be particularly specified." And of that opinion was the whole court, and judgment was given for the plaintiff. (o)

11. *With respect to acts valid at common law, but regulated as to the mode of performance by statute, — it is sufficient to use such certainty of allegation, as was sufficient before the statute.* (p)

[* 411] * Thus, by the common law, a lease for any number of years might be made by parol only; but, by the Statute of Frauds, 29 Car. II. c. 3, ss. 1, 2, all leases and terms for years made by parol, and not put into writing, and signed by the lessors or their agents authorised by writing, shall have only the effect of leases at will, — except leases not exceeding the term of three years from the making. Yet in a declaration of debt for rent on a demise, it is sufficient (as it was at common law) to state a demise for any number of years, without showing it to have been in writing — though where the lease is by indenture, the instrument is in practice usually set forth. (q) So, in the case of a

(o) *Chamberlain v. Greenfield*, 8 Wils. 292.

(p) 1 Saund. 276, n. (2), 211 n. (2); Anon. 2 Salk. 519. *Birch*

[* 411] v. * *Bellamy*, 12 Mod. 540; Bac. Ab. Statute, (L. 3); 4 Hen. VII. 8. *Chalié v. Belshaw*, 6 Bing. 529.

(q) 1 Saund. 276, n. (1); vide *suprà*, * p. 350.

promise to answer for the debt, default, or miscarriage, of another person (which was good by parol, at common law, but by the Statute of Frauds, sect. 4, is not valid unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, &c.) the declaration on such promise need not allege a written contract. (r)

And on this subject the following difference is to be remarked, that "where a thing is originally made by act of parliament, and required to be in * writing, it must be pleaded with all the cir- [*412] cumstances required by the act ; as in the case of a will of lands, it must be alleged to have been made in writing ; but where an act makes writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the Statute of Frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence." (s)

As to the rule under consideration, however, a distinction has been taken between a *declaration* and a *plea* ; and it is said that though in the former, the plaintiff need not show the thing to be in writing, (t) — in the latter the defendant must. Thus, in an action of *indebitatus assumpsit*, for necessities provided for the defendant's wife, the defendant pleaded, that, before the action was brought, the plaintiff and defendant, and one *J. B.*, the defendant's son, entered into a certain agreement, by which the plaintiff, in discharge of the

(r) 1 Saund. 211, n. (2) ; Anon. 2 Salk. 519.

(s) 1 Saund. 276, d. e. n. (2). See also *Oldroyd v. Crampton*, 4 Bing. N. C. 24. *Meigh v. Clinton*, 11 A. & E. 418 ; 3 P. & D. 211, S. C.

(t) That under some circumstances it is advisable to show in the declaration that an agreement was in writing, see *Whittaker v. Mason*, 2 Bing. N. C. 359.

debt mentioned in the declaration, was to accept [*413] the said *J. B.* as her debtor for £9, to be * paid when he should receive his pay as a lieutenant; and that the plaintiff accepted the said *J. B.* for her debtor, &c. Upon demurrer, judgment was given for the plaintiff, for two reasons; first, because it did not appear that there was any consideration for the agreement; secondly, that, admitting the agreement to be valid, yet, by the Statute of Frauds, it ought to be in writing, or else the plaintiff could have no remedy thereon; "and though, upon such an agreement, the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action, and not give her another upon the agreement pleaded." (*u*)

(*u*) *Case v. Barber*, Raym. 450. It is to be observed, that the plea was at all events a bad one, in reference to the first objection. The case is, perhaps, therefore, not decisive as to the validity of the second. But see per Parke, B. in *Taylor v. Hillary*, 1 Gale, 22; 3 Dowl. 461; 1 C., M. & R. 741, S. C. *Adams v. Wordley*, 2 Gale, 29; 1 M. & W. 374, S. C. *Rippinghall v. Lloyd*, 5 B. & Ad. 742.

* SECTION V.

[*414]

OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING.

RULE I.

PLEADINGS MUST NOT BE INSENSIBLE, NOR REPUGNANT. (v)

First, if a pleading be unintelligible (or, in the language of pleading, *insensible*), by the omission of material words, &c., this vitiates the pleading. (x)

Again, if a pleading be inconsistent with itself, or *repugnant*, this is ground for demurrer. (y)

Thus, where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately built, — this declaration was considered as bad for repugnancy; for the timber could not be for the building of a house already * built. (z) [*415] So, where the defendant pleaded a grant of a rent, out of a *term of years*, and proceeded to allege that, by virtue thereof he was seised in his demesne, *as of freehold*, for the term of his life, the plea was held bad for repugnancy. (a) But there is this exception; that if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading, without materially

(v) Com. Dig. Pleader, (C. 23). *Wyat v. Aland*, 1 Salk. 324; Bac. Ab. Pleas, &c. (I. 4). *Nevill v. Soper*, 1 Salk. 213; *Butt's case*, 7 Rep. 25 a. *Hutchinson v. Jackson*, 2 Lut. 1324; Vin. Ab. Abatement, (D. a).

(x) Com. Dig. Pleader, (C. 23). *Wyat v. Aland*, 1 Salk. 324.

(y) *Nevill v. Soper*, 1 Salk. 213; *Butt's case*, 7 Rep. 25 a. *Byass v. Wylie*, 5 Tyrw. 377.

(z) *Nevill v. Soper*, 1 Salk. 213.

(a) *Butt's case*, 7 Rep. 25 a.

altering the general sense and effect, it shall in that case be rejected, — at least, if laid under a *videlicet*, — and shall not vitiate the pleading; for the maxim is *utile per inutile non vitiatur*. (b)

RULE II.

PLEADINGS MUST NOT BE AMBIGUOUS, OR DOUBTFUL IN MEANING; AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED, WHICH IS MOST UNFAVOURABLE TO THE PARTY PLEADING. (c)

Thus, — if in trespass *quare clausum fregit*, [*416] the *defendant pleads, that the locus in quo was his freehold, he must allege that it was his freehold *at the time of the trespass*; otherwise the plea is insufficient. (d) So, in debt on a bond, conditioned to make assurance of land, if the defendant pleads that he executed a release, — his plea is bad, if it does not express *that the release concerns the same land*. (e) In trespass *quare clausum fregit*, and for breaking down two gates and three perches of hedges, the defendant pleaded that the said close was within the parish of *R*.

(b) Gilb. C. P. 131, 132. *The King v. Stevens*, 5 East, 255. *Wyat v. Aland*, 1 Salk. 324, 325; 2 Saund. 291, n. (1), 306, n. (14); Co. Litt. 303 b.

(c) Co. Litt. 303 b.; Com. Dig. Pleader, (E. 5). *Goodday v. Mitchell*, Cro. Eliz. 441; Dy. 66. *Purcell v. Bradley*, Yelv. 36. *Rose v. Standen*, 2 Mod. 295. *Dovaston v. Payne*, 2 H. Bl. 530. *Thornton v. Adams*, 5 M. & S. 38. *Walford v. Anthony*, 8 Bing. 75. *Mee v. [416] *Tomlinson*, 4 Ad. & El. 262. *Marshall v. Whiteside*, 1 Tyr. & Gran. 491. *Lorymer v. Vizeu*, 3 Bing. N. C. 222, 427. *Jackson v. Cobbin*, 8 M. & W. 790; 1 Dowl. N. S. 96, S. C. *Spilsbury v. Clough*, 2 G. & D. 17. *Dendy v. Powell*, 3 M. & W. 444. *Bowen v. Jenkins*, 6 A. & E. 924. *Eyre v. Shelley*, 6 M. & W. 269; 8 Dowl. 185, S. C. [*Baillie v. Moore*, 3 Q. B. 489.]

(d) Com. Dig. Pleader, (E. 5).

(e) Com. Dig. ubi supra; *Manser's case*, 2 Rep. 3.

and that all the parishioners there, from time immemorial, had used to go over the said close, upon their perambulation in Rogation week; and because the plaintiff had wrongfully erected *two gates and three perches of hedges*, in the said way, the defendant, being one of the parishioners, broke down those gates and those three perches of hedges. On demurrer it was objected, that though the defendant had justified the breaking down two gates and three perches of hedges, it does not appear that they were the *same gates and hedges*, in respect of which the plaintiff complained; it not being alleged that they *were [*417] the gates and hedges "*aforesaid*," or the gates and hedges "*in the declaration mentioned*." "And thereto agreed all the justices, that this fault in the bar was incurable. For Walmsley said, that he thereby doth not answer to that for which the plaintiff chargeth him." And he observed, that the case might be, that the plaintiff had erected *four gates*, and *six perches* of hedges; and that the defendant had broken down the whole of these,—having the justification mentioned in the plea, in respect of two gates and three perches only, and no defence as to the remainder;—and that the action might be brought in respect of the latter only. (f)

A pleading, however, is not objectionable as ambiguous or obscure, if it be *certain to a common intent*, (g) that

(f) *Goodday v. Mitchell*, Cro. Eliz. 441.

(g) Com. Dig. Pleader, (E. 7), (F. 17); 1 Saund. 49, n. (1); Long's case, 5 Rep. 121 a; Doct. Pl. 58. *Colthirst v. Bejushin*, Plow. 26, 28, 33. *Fulmerston v. Steward*, *ibid.* 102. *Cooper v. Monke*, Willes, 52. *The King v. Lyme Regis*, 1 Doug. 158. *Hamond v. Dod*, Cro. Car. 5. *Poynter v. Poynter*, *ibid.* 194. *Dovaston v. Payne*, 2 H. Bl. 530. *Jacobs v. Nelson*, 3 Taunt. 423. *Douse v. Coxe*, 8 Bing. 30. *Innes v. Colquhoun*, 7 Bing. 265.

is, if it be clear enough according to reasonable intendment or construction ; though not worded with [*418] absolute precision. (*h*) Thus, in *debt on a bond conditioned to procure *A. S.* to surrender a copyhold to the use of the plaintiff, a plea that *A. S.* surrendered and released the copyhold to the plaintiff in full court, and the plaintiff accepted it, without alleging that the surrender was *to the plaintiff's use*, is sufficient ; for this shall be intended. (*i*) So in a debt on a bond conditioned that the plaintiff shall enjoy certain land, &c., a plea that after the making of the bond until the day of bringing the action, the plaintiff did enjoy is good ; though it be not said that *always* after the making, until, &c. he enjoyed ; for this shall be intended. (*j*) And it is to be observed that in favour of a reasonable intendment, even the strict grammatical construction will not always be regarded. Thus, in an action of assumpsit on a bill of exchange, where the declaration stated that the drawer required the defendant to pay a sum of money to *his* order, it was held on special demurrer that the court would understand that *his* must refer to the drawer, and not to the defendant, though defendant was the last antecedent. (*k*)

Ambiguity is ground for demurrer ; but it is in general cured by verdict or by pleading over ; (*l*)

(*h*) It will be observed, that the word " certain " is here used not in the sense of *particular* or *specific*, as in former parts of this work, but in its other meaning of *clear* or *distinct*. See the double use of this word noticed, *suprà*, * p. 144.

(*i*) *Hamond v. Dod*, Cro. Car. 6.

(*j*) *Harlow v. Wright*, Cro. Car. 105.

(*k*) *Spyer v. Thelwall*, 1 Tyr. & Gr. 191 ; 2 C., M. & R. 692, S. C. See *Rex v. Wright*, 1 Ad. & El. 448. *Debenham v. Chambers*, 3 M. & W. 128. *Dellevene v. Percer*, 9 Dowl. 244 ; 7 M. & W. 439, S. C.

(*l*) There are some cases, however, in which ambiguity is not cured

* and at those stages of the cause that construc- [*419]
tion of the ambiguous expression must be
adopted which is most favourable to the party by
whom it is used. (m)

It is under this head of *ambiguity*, that the doctrine
of *negatives pregnant* appears most properly to arrange
itself. A *negative pregnant* is such a form of negative
expression as may imply or carry within it an affirma-
tive. This is considered as a fault in pleading; and
the reason why it is so considered is, that the meaning
of such a form of expression is ambiguous. In trespass,
for entering the plaintiff's house, the defendant pleaded
that the plaintiff's daughter gave him license to do so;
and that he entered by that license. The plaintiff
replied, that *he did not enter by her license*. This was
considered as a *negative pregnant*; and it was held, that
the plaintiff should have traversed the entry by itself,
or the license by itself, and not both together. (n) It
will be observed, that this traverse might imply or
carry within it that a license was given, though
the defendant did not * enter by that license. [*420]
It is, therefore, in the language of pleading, said
to be pregnant with that admission, viz. that a license
was given. (o) At the same time the license is not
expressly admitted; and the effect, therefore, is to
leave it in doubt whether the plaintiff means to deny
the license, or to deny that the defendant entered by

* by verdict. *Mayall v. Mitford*, 6 A. & E. 670. *Ladd v. Thomas*, [*419]
12 A. & E. 117; 4 P. & D. 9, S. C.

(m) *Hobson v. Middleton*, 6 Barn. & Cress. 295. *Lord Huntingtower
v. Gardner*, 1 Barn. & Cress. 297. *Fletcher v. Pogson*, 3 Barn. & Cress.
192. *Sheen v. Rickie*, 5 M. & W. 175. *Brancker v. Molyneux*, 1 M. &
G. 710. *France v. White*, 1 M. & G. 781.

(n) *Myn v. Cole*, Cro. Jac. 87.

(o) *Bac. Ab. Pleas*, &c. p. 420, 5th edit.

virtue of that license. It is this *ambiguity* which appears to constitute the fault. (*p*) The following is another example. In trespass for assault and battery the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, the defendant moderately chastised him. The plaintiff traversed, with an *absque hoc*, *that the defendant moderately chastised him*; and this traverse was held to be a negative pregnant; for while it apparently means to put in issue only the question of excess (admitting by implication the chastisement), it does not necessarily and distinctly make that admission; and is, therefore, ambiguous in its form. (*q*) If the plaintiff had replied, *that the defendant immoderately chastised him*, the objection would have been avoided;

but the proper form of traverse would have [*421] been ** de injuriâ suâ propriâ absque tali causâ*. (*r*)

This, by traversing the whole "cause alleged," would have distinctly put in issue all the facts in the plea, and no ambiguity or doubt as to the extent of the denial would have arisen.

This rule, however, against a negative pregnant appears, in modern times at least, to have received no very strict construction. For many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection. (*s*) Thus in debt

(*p*) 28 Hen. VI. 7. *Slade v. Drake*, Hob. 295; *Styles' Pract. Reg. tit. Negative Pregnant*; see Appendix, NOTE 55. See also *Thurman v. Wild*, 11 A. & E. 453; 3 P. & D. 289, S. C. Per Parke, B. in *Gwynne v. Burnell*, 6 Bing. N. C. 530.

(*q*) *Auberie v. James*, Vent. 70; 1 Sidd. 444; 2 Keb. 623, S. C.

(*r*) *Auberie v. James*, Vent. 70; but see *Penn v. Ward*, 2 C., M. & R. 238; see as to the traverse *de injuriâ*, *suprà*, * pp. 191, 192.

(*s*) See several instances mentioned in Com. Dig. Pleader, (R. 6). See

on a bond conditioned to perform the covenants in an indenture of lease, one of which covenants was, that the defendant, the lessee, would not deliver possession to any but the lessor or such persons as should lawfully evict him, the defendant pleaded, that he *did not deliver the possession to any but such as lawfully evicted him*. On demurrer to this plea, it was objected that the same was ill, and a *negative pregnant*; and that he ought to have said, that such an one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; * but the [*422] court held the plea, as *pursuing the words of the covenant*, good (being in the negative), and that the plaintiff ought to have replied and assigned a breach, and therefore judgment was given against him. (t)

RULE III.

PLEADINGS MUST NOT BE ARGUMENTATIVE. (u)

In other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.

also *Bennison v. Thelwall*, 7 M. & W. 512; 9 Dowl. 739, S. C. *Pigeon v. Osborne*, 12 A. & E. 715; 4 P. & D. 345, S. C. *Bell v. Tuckett*, 4 Scott's N. R. 402.

(t) *Pullin v. Nicholas*, 1 Lev. 83; see Com. Dig. Pleader, (R. 6); *semb. cont. Lea v. Luthell*, Cro. Jac. 559.

(u) Bac. Ab. Pleas, &c. (I. 5); Com. Dig. Pleader, (E. 3); Co. Litt. 303 a.; Dyer, 43 a. *Wood v. Butts*, Cro. Eliz. 260. *Ledesham v. Lubram*, *ibid.* 870. *Blackmore v. Tidderley*, 11 Mod. 38; 2 Salk. 423, S. C. *Murray v. East India Company*, 5 Barn. & Ald. 215. *Digby v. Alexander*, 8 Bing. 416; *Baden v. Flight*, 3 Bing. N. C. 685. *Kinlock v. Neville*, 6 M. & W. 795. *Fletcher v. Marillier*, 9 A. & E. 405. *Rowe v. Ames*, 6 M. & W. 747. *Wheeler v. Wright*, 7 M. & W. 359. *Fraser v. Welsh*, 8 M. & W. 629; 9 Dowl. 754, S. C. *Drewe v. Lainson*, 11 A. & E. 529. *Adams v. Jones*, 12 A. & E. 455; 4 P. & D. 174, S. C. *Butcher v. Stewart*, 9 M. & W. 405; 1 Dowl. N. S. 620, S. C. *Turquand v. Hawbrey*, 1 Dowl.

Thus in an action of trover for ten pieces of money, the defendant pleaded that there was a wager between the plaintiff and one *C.* concerning the quantity [*423] of yards of velvet in a cloak, and the *plaintiff and *C.* each delivered into the defendant's hand ten pieces of money, to be delivered to *C.* if there were ten yards of velvet in the cloak, and if not, to the plaintiff; and proceeded to allege, *that upon measuring of the cloak it was found that there were ten yards of velvet therein*, whereupon the defendant delivered the pieces of money to *C.* Upon demurrer, "Gawdy held the plea to be good enough; for the measuring thereof is the fittest way for the trying it; and when it is so found by the measuring, he had good cause to deliver them out of his hands to him who had won the wager. But Fenner and Popham held, that the plea was not good; for it may be that the measuring was false, and therefore he ought to have averred, in fact, that there were ten yards, and that it was so found upon the measuring thereof." (x) So in an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods; upon which the court remarked, "this is an infallible *argument* that the plaintiff is not guilty, and yet it is no plea." (y) Again, in ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, then steward of the manor. The plaintiff traversed *that Fosset was steward*. All the court held this to [*424] be no issue, and that the *traverse ought to be *that he did not surrender*; for if he were not

N. S. 925. *Jones v. Corbett*, 2 G. & D. 308. *Leaf v. Tuton*, 10 M. & W. 393; 2 Dowl. N. S. 300, S. C.

(x) *Ledesham v. Lubram*, Cro. Eliz. 870.

(y) Doct. Pl. 41; *Dyer*, 43 a.

steward, the surrender is void. (z) The reason of this decision appears to be, that to deny that Fosset was steward, could be only so far material as it tended to show that the surrender was a nullity; and that it was, therefore, an argumentative denial of the surrender; which, if intended to be traversed ought to be traversed in a direct form.

It is a branch of this rule *that two affirmatives do not make a good issue.* (a) The reason is, that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died seised in fee, and the plaintiff allege that he died seised in tail, this is not a good issue; (b) because the latter allegation amounts to a denial of a seisin in fee, but denies it by argument or inference only. It is this branch of the rule against *argumentativeness* that gave rise (as in part already explained) (c) to the form of a *special traverse*. Where, for any of the reasons mentioned in a preceding part of this work, it becomes expedient for a party traversing to set forth new affirmative matter, tending to ex- [*425] plain or qualify his denial, he is allowed to do so; but as this, standing alone, will render his pleading *argumentative*, he is required to add to his affirmative allegation an express denial, which is held to cure or prevent the argumentativeness. (d) Thus in the example last given, the plaintiff may allege, if he pleases,

(z) Wood v. Butts, Cro. Eliz. 260.

(a) Com. Dig. Pleader, (R. 3); Co. Litt. 126 a., per Buller, J. Chandler v. Roberts, Doug. 60; Doct. Pl. 43, 360; Zouch and Bamfield's case, 1 Leon. 77. Tomlin v. Surlice, 1 Wils. 6.

(b) Doct. Pl. 349; 5 Hen. VII. 11, 12.

(c) Suprà, * pp. 207, 208.

(d) Bac. Ab. Pleas, &c. (H. 3). Courtney v. Phelps, Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; 10 Hen. VI. 7, pl. 21.

that the party died seised in tail; but then he must add, *absque hoc, that he died seised in fee*, and thus resort to the form of a special traverse. (e)

Another branch of the rule against argumentativeness is, *that two negatives do not make a good issue*. (f) Thus if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected so to do, the plaintiff cannot reply that *he did not neglect and refuse to deliver* such abstract, but should allege affirmatively that *he did deliver*. (g)

[*426]

* RULE IV.

PLEADINGS MUST NOT BE HYPOTHETICAL, OR IN THE ALTERNATIVE. (h)

Thus in an action of debt against a gaoler for the escape of a prisoner, where the defendant pleaded, that *if* the said prisoner did at any time or times after the said commitment, &c. go at large, he so escaped without the knowledge of the defendant and against his will; and that *if* any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c., the court held the plea bad; for “he cannot plead hypothetically, that if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no

(e) Doct. Pl. 349.

(f) Com. Dig. Pleader, (R. 3).

(g) Martin v. Smith, 6 East, 557.

(h) Griffiths v. Eyles, 1 Bos. & Pul. 413. Cook v. Cox, 3 M. & S. 114. The King v. Brereton, 8 Mod. 330. Witherley v. Sarsfield, 1 Show. 127. Rex v. Morley, 1 You. & Jer. 221. Margetts v. Bays, 4 Ad. & El. 489. Gould v. Lasbury, 4 Tyrw. 863.

escape ; or that there have been one, two, or ten escapes, after which the prisoner returned.” (i)

So where it was charged that the defendant wrote and published, *or* caused to be written and published, a certain libel, this was considered as bad for uncertainty. (k)

* So where a plea of the Statute of Limitations alleged that the debt, “if any such there be,” did not accrue within six years, it was held to be ill on special demurrer. (l)

RULE V.

PLEADINGS MUST NOT BE BY WAY OF RECITAL, BUT MUST BE POSITIVE IN THEIR FORM. (m)

The following example may be adduced to illustrate this kind of fault. If a declaration in trespass for assault and battery make the charge in the following form of expression :—“And thereupon the said *A. B.* by —, his attorney, complains, for that *whereas* the said *C. D.* heretofore, to wit, &c. made an assault, &c.” instead of “for *that* the said *C. D.* heretofore, to wit,

(i) *Griffiths v. Eyles*, 1 Bos. & Pul. 413.

(k) *The King v. Brereton*, 8 Mod. 330. In an action, however, on * a policy of assurance, it may be alleged, “that *A., B., C.,* [*427] and *D.,* *or* some *or* one of them were *or* was interested.” Reg. Hil., 4 Will. IV.

(l) *Margetts v. Bays*, 4 Ad. & El. 489. Et vide *Gould v. Lasbury*, 4 Tyrw. 863. *Wise v. Hodsall*, 11 A. & E. 816; 3 P. & D. 510, S. C. *Eavestaff v. Russell*, 1 Dowl. N. S. 950; 10 M. & W. 365, S. C.

(m) Bac. Ab. Pleas, &c. (B. 4). *Sherland v. Heaton*, 2 Bulst. 214. *Wettenhall v. Sherwin*, 2 Lev. 206. *Mors v. Thacker*, *ibid.* 193. *Horo v. Chapman*, 2 Salk. 636. *Dunstall v. Dunstall*, 2 Show. 27; *Gourney v. Fletcher*, *ibid.* 295. *Dobbs v. Edmunds*, Ld. Raym. 1413. *Wilder v. Handy*, Stra. 1151. *Marshall v. Riggs*, *ibid.* 1162.

&c. made an assault," &c., this is bad, for nothing is positively affirmed. (n)

[*428] *So where a deed or other instrument is pleaded, it is in general not proper to allege (though in the words of the instrument itself) that *it is witnessed* (*testatum existit*) that such a party granted, &c.; but it should be stated absolutely and directly that he granted, &c. But as to this point a difference has been established between declarations and other pleadings. In the former (for example, in a declaration of covenant), it is sufficient to set forth the instrument with a *testatum existit*, though not in the latter. And the reason given is, that in a declaration such statement is merely inducement, that is, introductory to some other direct allegation. Thus, in covenant, it is introductory to the assignment of the breach. (o)

RULE VI.

THINGS ARE TO BE PLEADED ACCORDING TO THEIR LEGAL EFFECT OR OPERATION. (p)

The meaning is, that in stating an instrument,* or other matter, in pleading, it should be set forth, not according to its tenor, but

(n) See the authorities last cited. It will be observed, however, that in *trespass on the case* the "whereas" is unobjectionable; being used only as introductory to some subsequent positive allegation; see the [*428] *same cases and the forms of declaration in the first chapter. See also *Ring v. Roxbrough*, 2 *Crompt. & Jer.* 418; 2 *Tyr.* 470, from which it would seem that the objection can in no case be taken on *general demurrer*.

(o) *Bultivant v. Holman*, *Cro. Jac.* 537; 1 *Wms. Saund.* 274, n. (1); see the form of declaring with a *testatum existit*, 3 *Went.* 352, 528.

(p) *Bac. Ab. Pleas, &c.* (l. 7); *Com. Dig. Pleader*, (C. 87); 2 *Wms. Saund.* 97, and 97 b., n. (2). *Barker v. Lade*, 4 *Mod.* 150. *Howell v.*

according to its *effect in law*; and the reason seems to be, that it is under the latter aspect that it must principally and ultimately be considered, and, therefore, to plead it in terms or form only, is an indirect and circuitous method of allegation. Thus, if a joint tenant conveys to his companion by the words "gives," "grants," &c., his estate in the lands holden in jointure, this, though in its terms a *grant*, is not properly such in operation of law, but amounts to that species of conveyance called a *release*. It should therefore be pleaded not that he "granted," &c., but that he "released," &c. (q) So if a tenant for life grant his estate to him in reversion, this is in effect a *surrender*, and must be pleaded as such, and not as a *grant*. (r) So where the plea stated that *A.* was entitled to an equity of redemption, and subject thereto that *B.* was seised in fee, and that they by lease and release granted, &c. the premises, excepting and reserving to *A.* and his heirs, &c., a liberty of hunting, &c.; it was held upon general demurrer, and afterwards upon writ of error, that, as *A.* had * no legal interest in the land, [*430] there could be no *reservation* to him; that the plea, therefore, alleging the right (though in terms of the deed) by way of *reservation* was bad; and that if (as was contended in argument) the deed would operate as a *grant* of the right, the plea should have

Richards, 11 East, 638. Moore v. Earl of Plymouth, 3 Barn. & Ald. 66. Stroud v. Lady Gerrard, 1 Salk. 8; 1 Wms. Saund. 235 b., n. (9).

* Pike v. Eyre, 9 Barn. & Cress. 909. Price v. Williams, 1 Tyr. [*429] & Gr. 197. Wright v. Williams, 1 Tyr. & Gr. 375. See per Parke, B., in Simpson v. Nicholls, 3 M. & W. 240. See also Attwood v. Taylor, 1 M. & G. 281, note (d). Turner v. Hardey, 9 M. & W. 770.

(q) 2 Saund. 97. Barker v. Lade, 4 Mod. 150, 151.

(r) Barker v. Lade, 4 Mod. 151.

been so pleaded, and should have alleged a *grant* and not a *reservation*. (s)

The rule in question is in its terms often confined to *deeds* and *conveyances*. It extends however to all instruments in writing, and contracts written or verbal ; and indeed it may be said generally to all matters or transactions whatever which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect. (t) But there is an exception in the case of a declaration for written or verbal *slander*, where (as the action turns on the words themselves) the words themselves must be set forth ; and it is not sufficient to allege that the defendant published a libel containing false and scandalous matters *in substance*, as follows, &c., or used words *to the effect* following, &c. (u)

[*431]

* RULE VII.

PLEADINGS SHOULD OBSERVE THE KNOWN AND ANCIENT FORMS OF EXPRESSION, AS CONTAINED IN APPROVED PRECEDENTS. (x)

Thus the forms of original writs and of declarations contained in the first chapter, present various specimens

(s) *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66 ; et vide *suprà*, * p. 347.

(t) *Stroud v. Lady Gerrard*, 1 Salk. 8. *Hart v. Proudfoot*, 8 Dowl. 306. *Turner v. Hardey*, 9 M. & W. 770.

(u) *Wright v. Clements*, 3 Barn. & Ald. 503. *Cook v. Cox*, 3 M. & S. 110. *Newton v. Stubbs*, 2 Show. 435. *Gutsole v. Mathews*, 1 Tyr. & G. 694. See an example of the manner in which a libel is set

[*431] * forth, *suprà*, * pp. 44, 45. But in an action for a malicious prosecution it is sufficient to declare *quod crimen felonix imposuit*, without stating the words used. *Pippet v. Hearn*, 5 Barn. & Ald. 634. *Blizard v. Kelly*, 2 Barn. & Cress. 283. *Davis v. Noake*, 6 M. & S. 33.

(x) Com. Dig. Abatement, (G. 7). *Buckley v. Rice Thomas*, Plow. 123. *Dally v. King*, 1 H. Bla. 1. *Slade v. Dowland*, 2 Bos. & Pul. 570. *Dowland v. Slade*, 5 East, 272. *King v. Fraser*, 6 East, 351. *Dyster*

of technical language, appropriate from the remotest times to each particular cause of action, from which it would be inartificial and incorrect to deviate. Some of the general issues also present examples of forms of expression fixed by ancient usage, from which it is improper to depart. And another illustration of this rule occurs in the following modern case. To an action on the case, the defendants pleaded the Statute of Limitations, viz., *that they were not guilty within six years, &c.* The court decided upon special demurrer, that this form of pleading was bad, upon the ground, that, "from the passing of the statute to the present case, the invariable form of pleading * the statute, to an [*432] action on the case for a wrong, has been to allege *that the cause of action did not accrue within six years, &c.*; and that it was important to the administration of justice, that the usual and established forms of pleadings should be observed." (y)

So where in an action on a bill of exchange, against the drawer, the declaration, after a statement of the drawing and non-payment of the bill, omitted the usual (though merely formal) allegation that the drawer *promised to pay*; this mode of declaring was held, on special demurrer, to be insufficient. (z)

It may be remarked, however, with respect to this rule, that the allegations to which it relates are of course only those of frequent and ordinary recurrence; and that even as to these, it is rather of uncertain applica-

v. Battye, 3 Barn. & Ald. 448; per Abbott, C. J., *Wright v. Clements*, *ibid.* 507.

(y) *Dyster v. Battye*, 3 Barn. & Ald. 448.

(z) *Henry v. Burbidge*, 3 Bing. N. C. 501; 5 Dowl. 484, S. C. But see *Chevers v. Parkington*, 6 Dowl. 75. *Donaldson v. Thompson*, 6 M. & W. 316; 8 Dowl. 209, S. C. *Stericker v. Barker*, 9 M. & W. 321; 1 Dowl. N. S. 370, S. C.

tion, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedents, as to admit of no variation. (a)

Another rule connected in some measure [*433] with * the last, and apparently referable to the same object, is the following.

RULE VIII.

PLEADINGS SHOULD HAVE THEIR PROPER FORMAL COMMENCEMENTS AND CONCLUSIONS. (b)

This rule refers to certain formulæ occurring at the *commencement* of pleadings subsequent to the declaration, and to others occurring at the *conclusion*.

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the *prayer of judgment*.

A PLEA TO THE JURISDICTION has usually no *commencement* of the kind in question. (c) Its *conclusion* is as follows: —

— the defendant prays judgment, if the court of our Lady the Queen here will or ought to have further cognisance of the plea (d) aforesaid.

[* 434] * or (in some cases) thus :

— the defendant prays judgment if he ought to be compelled to answer to the said plea here in court. (e)

(a) See Appendix, NOTE 56.

(b) Co. Litt. 303 b.; Com. Dig. Pleader, (E. 27), (E. 28), (E. 32), (E. 33), (F. 4), (F. 5), (G. 1); Com. Dig. Abatement, (I. 12); 2 Wms. Saund. 209, n. (1); per Holt, C. J., *Bowyer v. Cook*, 5 Mod. 146. *Galway v. Rose*, 6 M. & W. 294; 8 Dowl. 239, S. C.

(c) 1 Chitty, 460, 6th edit. But sometimes it has such commencement. Vide *ibid*.

(d) 1 Went. 49; 3 Bla. Com. 303. *Powers v. Cook*, Ld. Raym. 63.

(e) 1 Went. 41, 49; Bac. Ab. Pleas, &c. (E. 2); per Holt, C. J., *Bowyer v. Cook*, 5 Mod. 146. *Powers v. Cook*, Ld. Raym. 63.

A PLEA IN SUSPENSION seems also to be in general pleaded without formal *commencement*. (*f*) Its *conclusion* is thus : —

— the defendant prays that the suit may remain or be respited without day until, &c. (*g*)

A PLEA IN ABATEMENT is also usually pleaded without a formal *commencement* within the meaning of this rule. (*h*) The *conclusion* is thus : —

in case of plea founded on objection to the frame of the original writ (in real or mixed) or the declaration (in personal) actions —

— prays judgment of the said writ (or declaration), and that the same may be quashed. (*i*)

* in case of plea founded on the disability of the [*435] party —

— prays judgment if the plaintiff ought to be answered to his said declaration. (*k*)

A PLEA IN BAR, until the change of practice intro-

(*f*) 2 Chitty, 472, 1st edit. Plaskett v. Beeby, 4 East, 485.

(*g*) See Lib. Plac. 9, 10; 1 Went. 15; 2 Wms. Saund. 210, n. (1); John Trollop's case, 8 Rep. 69; Reg. Plac. 180.

(*h*) 2 Wms. Saund. 209 a., n. (1); 1 Arch. 305; Lutw. 11. (Qu. ? See the precedents, 2 Chitty, 6th edit. tit. Pleas in Abatement; 1 Went. tit. Abatement.)

(*i*) Powers v. Cook, Ld. Raym. 63; 2 Wms. Saund. 209 a., n. (1); Com. Dig. Abatement, (I. 12); 2 Chitty, 714, 6th edit. Yet in some * instances it seems it may be *si curia cognoscere velit*. Ibid. 411. [*435] Chatland v. Thornley, 12 East, 544. [In Davies v. Thomson, 14 M. & W. 161, and in Whitting v. Des Anges, 3 C. B. 910, a plea in abatement for non-joinder of a joint contractor as co-defendant was held bad for praying judgment of the declaration only, and not of the writ also.]

(*k*) Rast. Ent. 252 c., 682 b., 681 c.; Co. Litt. 128 a.; Com. Dig. Abatement, (I. 12); 1 Went. 58, 62. See Appendix, NOTE 57.

duced by a recent Rule of Hil. T. 4 W. IV. had this *commencement* :

— says that said plaintiff ought not to have or maintain his aforesaid action against him the said defendant, because he says, &c.

This formula is commonly called *actio. non.*

The *conclusion* was,

— prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.

But as these expressions were, from the great comparative frequency of pleas in bar, of almost continual occurrence, it was thought desirable, for the sake of brevity, to abandon altogether the use of formulæ which led to so much reiteration ; and by the Rule of [*436] court just mentioned, it was * accordingly provided, that in future it should not be necessary, where the plea is pleaded *in bar of the whole action generally*, to use any allegation of *actionem non*, or any *prayer of judgment* ; but that a plea pleaded without such formal parts shall nevertheless be taken as pleaded in bar of the action. (*l*)

A REPLICATION TO A PLEA TO THE JURISDICTION has this *commencement* : —

— says, that notwithstanding any thing by the defendant above alleged, the court of our Lady the Queen here ought not to be pre-

(*l*) This rule applies to a plea answering the whole of one count, though there are other counts which it does not answer. *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824, S. C., in error. *Worley v. Harrison*, 3 A. & E. 669. *Benmore v. Neck*, 2 Har. & W. 178. *Putney v. Swan*, 5 Dowl. 296; 2 M. & W. 72, S. C. *Upward v. Knight*, 5 Bing. N. C. 338. *Weeding v. Aldrich*, 9 A. & E. 861. *Ratton v. Davis*, 1 G. & D. 21. As to the object of the rule, see Appendix, NOTE 58.

cluded from having further cognisance of the plea aforesaid, because he says, &c. (*m*)

or this —

— says that the defendant ought to answer to the said plea here in court; because he says, &c. (*n*)

and this *conclusion* : —

* — wherefore he prays judgment, and that the court here [*437] may take cognisance of the plea aforesaid, and that the defendant may answer over, &c. (*o*)

A REPLICATION TO A PLEA IN SUSPENSION should, probably, have this *commencement* : —

— says, that notwithstanding anything by the defendant above alleged, the suit ought not to stay or be respited; because he says, &c. (*p*)

and this *conclusion* : —

— wherefore he prays judgment if the suit ought to stay or be respited, and that the defendant may answer over.

A REPLICATION TO A PLEA IN ABATEMENT has this *commencement* : —

where the plea was founded on objection to the declaration, —

— says, that his said declaration, by reason of any thing in the said plea alleged, ought not to be quashed; because he says, &c. (*q*)

where the plea was founded on the disability of the party, —

(*m*) 1 Went. 60; Lib. Plac. 348.

(*n*) 1 Went. 39.

(*o*) Lib. Plac. 348; 1 Went. 39.

(*p*) Liber. Intrat.

(*q*) See 1 Arch. 309; Rast. Ent. 126 a. Sabine v. Johnstone, 1 Bos. & Pul. 60.

[*438] * — says, that notwithstanding any thing in the said plea alleged, he the plaintiff ought to be answered to his said declaration ; because he says, &c. (*r*)

The *conclusion* in most cases is thus : —

in the former kind of plea, —

— wherefore he prays judgment, and that the said declaration may be adjudged good, and that the defendant may answer over, &c.

in the latter, —

— wherefore he prays judgment, and that the said defendant may answer over, &c. (*s*)

A REPLICATION TO A PLEA IN BAR, before the Rule of court of Hil. 4 Will. IV. above mentioned, had this *commencement*, —

— says, that by reason of any thing in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against him the defendant, because he says, &c.

[*439] * This formula is commonly called *precludi non*.

The *conclusion* was thus : —

in *Debt*, —

— wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, to be adjudged to him.

(*r*) 1 Went. 42; 1 Arch. 309.

(*s*) 1 Went. 43, 45, 54; 1 Arch. 309; Rast. Ent. 126 a. *Bisse v. Harcourt*, 3 Mod. 281; 1 Salk. 177; 1 Show. 155; Carth. 137, S. C. As to the cases in which the *conclusion* should be different, and should pray damages, see 2 Wms. Saund. 211, n. (3). *Medina v. Stoughton*, *Ld. Raym.* 594; *Co. Ent.* 160 a.; *Lil. Ent.* 123; *Lib. Plac.* 1.

in *Covenant*, —

— wherefore he prays judgment, and his damages by him sustained by reason of the said breach of contract, to be adjudged to him.

in *Trespass*, —

— wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said trespasses, to be adjudged to him.

in *Trespass on the case*, — in *Assumpsit*, —

— wherefore he prays judgment, and his damages by him sustained, by reason of the not performing of the said several promises and undertakings, to be adjudged to him.

in *Trespass on the case*, — in *general*, —

— wherefore he prays judgment and his damages by him sustained, by reason of the committing of the said several grievances, to be adjudged to him.

* And in all *other actions* the replication, in [*440] like manner, concluded with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action. (t)

But the Rule of Hil. 4 W. IV. provides that no allegation of *actionem non*, or *precludi non*, or *prayer of judgment*, shall in future be necessary in any pleading subsequent upon a plea pleaded *in bar of the whole action generally*; but that every replication or subsequent pleading, pleaded without these formulæ, shall nevertheless be taken as in bar or maintenance respectively of the action. (u)

With respect to PLEADINGS SUBSEQUENT TO THE REPLICATION, it will be sufficient to observe in general,

(t) See the forms, 2 Chitty, 615, 628, 630, 641, 1st edit.; 1 Arch. 410, 442.

(u) Vide *suprà*, *p. 436, n. (l).

that those on the part of the defendant commence and conclude like the plea ; those on the part of the plaintiff, like the replication.

The forms of commencement and conclusion given above, are subject to the following variations : —

[*441] First, with respect to *pleas in abatement*. * Matters of abatement, in general, only render the action *abatable* upon plea : but there are others, such as the death of the plaintiff or defendant before verdict or judgment by default, that are said to abate it *de facto* ; that is, by their own immediate effect, and before plea ; the only use of the plea in such cases being to give the court notice of the fact.(x) Where the action is merely *abatable*, the forms of *conclusion* above given are to be observed ; — but when abated *de facto*, the *conclusion* must pray, “ whether the court will further proceed ; ” for the declaration being already and *ipso facto* abated, it would be improper to pray “ that it may be quashed.” (y)

Again, when a plea in bar is pleaded *after a previous plea*, (z) it has a *commencement* and *conclusion* of *actio non ulterius* ; as in the example, *suprà*, * p. 71.

So, if a plea in bar be founded on any matter arising *after the commencement of the action*, though it be not pleaded *after a previous plea*, it has the same [*442] *commencement* and *conclusion* of *actio non *ulterius*, (a) and *actionem non* generally would be improper ; for that formula is taken to refer, in point

(x) Bac. Ab. Abatement, (K.), (G.), (F.) ; Com. Dig. Abatement, (E. 17) ; 2 Wms. Saund. 210, n. (1).

(y) Com. Dig. Abatement, (H. 33), (I. 12) ; 2 Wms. Saund. 210, n. (1). *Hallowes v. Lucy*, 3 Lev. 120.

(z) As to this kind of plea, vide *suprà*, * pp. 70, 71.

(a) *Le Bret v. Papillon*, 4 East, 502 ; 2 Chitty, 421, 1st edit. *Hall v. Cole*, 4 A. & E. 577. *Corbett v. Swinburne*, 8 A. & E. 673.

of time, to the commencement of the suit, and not to the time of plea pleaded. (b) Thus the plea of payment into court (as to which vide *suprà*, * p. 252) is always pleaded with *actio non ulterius*. (c)

Again, all pleadings by way of *estoppel* have a *commencement* and *conclusion* peculiar to themselves. A *plea* in *estoppel* has the following *commencement*; “says, that the plaintiff ought not to be admitted to say” (stating the allegation to which the *estoppel* relates);—and the following *conclusion*; “wherefore he prays judgment, if the plaintiff ought to be admitted, against his own acknowledgment, by his deed aforesaid” (or otherwise, according to the matter of the *estoppel*), “to say that” (stating the allegation to which the *estoppel* relates). (d) A *replication*, by way of *estoppel* to a plea, either in *abatement* or *bar*, has this *commencement*; “says, that the defendant ought not to be admitted to plead the said plea by him above pleaded; because he says, &c.” (e) * Its *conclusion*, in a case of plea [*443] of *abatement*, is as follows; “wherefore he prays judgment if the defendant ought to be admitted to his said plea, contrary to his own acknowledgment, &c., and that he may answer over, &c. :” (f) — in case of a plea in *bar*, — “wherefore he prays judgment, if the defendant ought to be admitted, contrary to his own acknowledgment, &c., to plead, that” (stating the allegation to which the *estoppel* relates). (g) *Rejoinders and subsequent pleadings* follow the forms of pleas and replications respectively. (h)

(b) *Ibid.* Evans v. Prosser, 3 T. R. 186; Selw. Ni. Pri. 138.

(c) See the Rule of court, H. T., 4 Will. IV.

(d) 1 Arch. 202. Veale v. Warner, 1 Wms. Saund. 325; 3 Ed. III. 21.

(e) Took v. Glascock, 1 Saund. 257; 2 Chitty, 590, 592, 1st edit.

(f) 2 Chitty, 590.

(g) 2 Chitty, 592, 1st edit.

(h) Veale v. Warner, 1 Saund. 325.

Again, if any pleading be intended to apply to *part* only of the matter adversely alleged, it must be qualified accordingly in its *commencement* and *conclusion*. (i)

Another variation occurs in the action of *replevin*. Avowries and cognisances, instead of being pleaded with *actio. non*, commence thus—an avowry, that the defendant “*well avows*,”—a cognisance, that he “*well acknowledges*,” the taking, &c., and conclude thus—that the defendant “prays judgment and a [*444] return of the said goods and *chattels together with his damages, &c., according to the form of the statute in such case made and provided to be adjudged to him,” &c. And the subsequent pleadings have correspondent variations. (k)

It is to be observed, too, that there has been always an exception to this rule, in the case of such pleadings as *tender issue*. These, instead of the conclusion with a *prayer of judgment*, as in the above forms, conclude (in the case of the trial by jury) *to the country*; or (if a different mode of trial be proposed,) with other appropriate formulæ, as explained under the second rule of the first section. (l) Pleadings which tender issue have, however, the formal *commencements*; unless they are pleaded in bar or maintenance of the whole action generally; for in that case the Rule of court dispenses with these formulæ altogether.

In general a defect or impropriety in the *commencement* and *conclusion* of a pleading, (in cases where these

(i) *Weeks v. Peach*, 1 Salk. 179; *Worley v. Harrison*, 3 A. & E. 669, *Putney v. Swan*, 5 Dowl. 296; 2 M. & W. 72, S. C. *Vere v. Goldborough*, 1 Bing. N. C. 353; see the example, *suprà*, *p. 305. See *Harvey v. Grabham*, 5 A. & E. 61.

(k) See examples, 8 Went. 106, 107, 109, 112, &c.; see Appendix, NOTE 59.

(l) *Suprà*, *pp. 264, 265.

forms are not dispensed with by the rule of court,) is ground for demurrer. (*m*) But *in a [*445] case where *actio. non* was improperly substituted for *actio. non ulterius*, it was held that the objection could only be taken by way of special demurrer. (*n*) And, in some instances, irregularities of this description afford no ground for objection; for if the *commencement* pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the *conclusion*. (*o*) And the converse case, as to a right of prayer in the *conclusion*, with an improper *commencement*, has been decided the same way. (*p*) So, if judgment be simply prayed, without specifying *what* judgment, it is said to be sufficient; and it is laid down, that the court will, in that case, *ex officio*, award the proper legal consequence. (*q*) It seems, however, that these relaxations from the rule do not apply to pleas in *abatement*; the court requiring greater strictness in these pleas, with a view to discourage their use. (*r*)

*It will be observed, that the *commencement* [*446] and *conclusion* of a plea are in such form as to

(*m*) *Nowlan v. Geddes*, 1 East, 634. *Wilson v. Kemp*, 2 M. & S. 549. *Le Bret v. Papillon*, 4 East, 502; Com. Dig. Pleader, (E. 27). *Weeks v. Peach*, 1 Salk. 179. *Powell v. Fullerton*, 2 Bos. & Pul. 420.

* *Vere v. Goldsborough*, 1 Bing. N. C. 353. *Smith v. Smith*, 5 [*445] Dowl. 84. But in some cases, a bad conclusion makes the plea a mere nullity, and operates as a *discontinuance*. *Bisse v. Harcourt*, 3 Mod. 281; 1 Salk. 177; 1 Show. 155; Carth. 137, S. C. *Weeks v. Peach*, 1 Salk. 179.

(*n*) *Hall v. Cole*, 4 A. & E. 577.

(*o*) *Street v. Hopkinson*, Rep. temp. Hard. 345.

(*p*) *Talbot v. Hopwood*, Fort. 335.

(*q*) 1 Chitty, 460, 558, 6th edit.; *Pitt v. Knight*, 1 Lev. 222. *Barnes v. Gladman*, 2 Lev. 19. *Curwen v. Fletcher*, Str. 520. *Le Bret v. Papillon*, 4 East, 502; 1 Wms. Saund. 97, n. (1). *Sed quare*.

(*r*) *The King v. Shakespeare*, 10 East, 88. *Attwood v. Davis*, 1 Barn. & Ald. 172.

indicate the view in which it is pleaded, and to mark its object and tendency, as being either to the jurisdiction, in suspension, in abatement, or in bar. It is, therefore, held, that the class and character of a plea depend upon these its formular parts; which is ordinarily expressed by the maxim — *conclusio facit placitum*. (s) Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the suit, it is a bad plea in bar, and no plea in abatement. (t) And on the other hand, it has been held, that if a plea commence and conclude as in abatement, and show matter in bar, it is a plea in abatement and not in bar. (u)

As the *commencement* and *conclusion* have this effect, of defining the character of the *plea*, so they have the same tendency in the *replication* and *subsequent pleadings*. For example, they serve to show whether the pleading be intended as in confession and avoidance, or estoppel; and whether intended to be pleaded [*447] to the whole, or to part. *From these considerations, it is apparent that they are forms, which, on the whole, materially tend to clearness and precision in pleading; and they have, for that reason, been considered under this section.

The Rule of court dispensing with them in the single case of pleas in bar to the whole action, and the pleadings consequent upon pleas in bar, has not, in its pursuit of brevity, lost sight of the advantages above

(s) *Street v. Hopkinson*, Rep. temp. Hard. 346. *Medina v. Stoughton*, 1 Ld. Raym. 593. *Talbot v. Hopwood*, Fort. 335.

(t) *Nowlan v. Geddes*, 1 East, 634. *Wallis v. Savil*, 1 Lut. 41; 2 Wms. Saund. 209, d. n. 1; per Littleton, J., 36 Hen. VI. 18. *Medina v. Stoughton*, 1 Ld. Raym. 593.

(u) *Medina v. Stoughton*, 1 Ld. Raym. 593. *Godson v. Good*, 6 Taunt. 587; see Appendix, NOTE 60.

pointed out, as resulting from these forms; for, as the Rule does not apply to any description of pleading except that which is pleaded in bar or maintenance of the action generally, a plea or replication, &c., so pleaded, will now be as distinctly characterised by the absence of commencement and conclusion, as it formerly was by its appropriate accompaniments of *actionem non*, *precludi non*, or *prayer of judgment*.

In connection with the rule of pleading last mentioned, and in a view to the same objects of clearness and precision, is established the following rule:

* RULE IX.

[*448]

A PLEADING WHICH IS BAD IN PART, IS BAD ALTOGETHER. (x)

The meaning of this rule is, that if in any material part of its allegation, or in reference to any of the material things which it undertakes to answer, or to either of the parties answering, the pleading be bad, though in other respects it be free from objection, the whole of it is open to demurrer; so that, if the objection be good, the whole pleading in question is overruled, and judgment given accordingly. (y) Thus, if in a declara-

(x) Com. Dig. Pleader, (E. 36), (F. 25); 1 Wms. Saund. 28, n. 2. Webb v. Martin, 1 Lev. 48. Phillips v. Biron, 1 Str. 509. Rowe v. Tutte, Willes, 14. Trueman v. Hurst, 1 T. R. 40. Webber v. Tivill, 2 Saund. 127. Duffield v. Scott, 3 T. R. 374. Hedges v. Chapman, 2 Bing. 523. Earl of St. Germans v. Willan, 2 Barn. & Cress. 216. Clarkson v. Lawson, 6 Bing. 273. Crump v. Adney, 1 Crompt. & Mee. 355. Tremere v. Morison, 1 Bing. N. C. 89. Ansell v. Smith, 3 Dowl. 193. Dyke v. Duke, 4 Bing. N. C. 197. Calvert v. Moggs, 10 A. & E. 632. Sherman v. Thompson, 11 A. & E. 1027; 3 P. & D. 656, S. C. Phillips v. Claggatt, 10 M. & W. 102. As to the exception in the particular case of a plea of set-off, see Downsland v. Thompson, 2 Bl. 910; 1 Wms. Saund. 28, n. d.

(y) As to the point how far a plea *disproved* in part, is disproved alto-

tion in assumpsit, two different promises be alleged in two different counts, and the defendant plead in bar to both counts conjointly, the Statute of Limitations, viz., that he did not promise within six years, and [*449] *the plea be an insufficient answer as to one of the counts, but a good bar as to the other — *the whole plea* is bad, and neither promise is sufficiently answered. (z) So, where to an action of trespass for false imprisonment against two defendants, they pleaded that one of them, A., having ground to believe that his horse had been stolen by the plaintiff, gave him in charge to the other defendant, a constable, whereupon the constable, and A., in his aid, and by his command, laid hands on the plaintiff, &c. — the plea was adjudged to be bad as to both the defendants, because it showed no reasonable ground of suspicion: for A. could not justify the arrest without showing such ground; and though the case might be different as to the constable, whose duty was to act on the charge, and not to deliberate, yet as he had not pleaded separately, but had joined in A.'s justification, the plea was bad as to him also. (a)

This rule seems to result from that which requires each pleading to have its proper formal commencement and conclusion. For, by those forms (it will be observed), the matter which any pleading contains is offered as an entire answer to the whole of that which last preceded. Thus, in the first example above given, the defendant would, (prior to the Rule of [* 450] court dispensing with the * *actionem non*, &c.)

gether, see *Cousins v. Padden*, 4 Dowl. 494. *Hill v. White*, 6 Bing. N. C. 26; 8 Dowl. 13, et vide *suprà*, * p. 91.

(z) *Webb v. Martin*, 1 Lev. 48.

(a) *Hedges v. Chapman*, 2 Bing. 523.

have alleged, in the commencement of his plea, that the plaintiff "ought not to have or maintain his *action*," for the reason therein assigned: and therefore he would pray judgment, &c., as to the whole *action* in the conclusion. If, therefore, the answer be insufficient as to one count, it cannot avail as to the other; because, if taken as a plea to the latter only, the *commencement* and *conclusion* would be wrong. It is to be observed, that there was but one plea, and consequently there would have been but one commencement and conclusion; but if the defendant had pleaded the statute, in bar to the first count separately, and then pleaded it to the second count, with a new commencement and conclusion, thus making two pleas instead of one, the invalidity of one of these pleas could not have vitiated the other.

As the *declaration* contains no commencement or conclusion of the kind to which the last rule relates, so, on the other hand, the *declaration* does not fall within the rule now in question. Therefore, if a declaration be good in part, though bad as to another part, relating to a distinct demand divisible from the rest, and the defendant demur to the whole, instead of confining his demurrer to the faulty part only, the court will give judgment generally for the plaintiff. (b) It is also to be observed *that the rule applies only to ma- [*451] terial allegations; for where the objectionable matter is mere surplusage, and unnecessarily introduced,

(b) 1 Wms. Saund. 286, n. (9); Bac. Ab. Pleas, &c. (B. 16).

* Cutforthay v. Taylor, Raym. 395. Judin v. Samuel, 1 New [*451] Rep. 43. Benbridge v. Day, 1 Salk. 218. Powdick v. Lyon, 11 East, 565. Amory v. Brodrick, 5 Barn. & Ald. 712. Fergusson v. Mitchell, 4 Dowl. 513, and see the note of the reporter, ibid. p. 524 (b). Spyer v. Thelwell, 1 Tyr. & Gr. 191. Price v. Williams, 1 Tyr. & Gr. 197. Wainwright v. Johnson, 5 Dowl. 317.

(the answer being complete without it,) its introduction does not vitiate the rest of the pleading. (c)

SECTION VI.

OF RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY IN PLEADING.

RULE I.

THERE MUST BE NO DEPARTURE IN PLEADING. (d)

A departure takes place when, in any pleading, [* 452] the party deserts the ground that he took in his last antecedent pleading, and resorts to another. (e)

A departure obviously can never take place till the *replication*.

Of departure in the *replication*, the following is an

(c) *Duffield v. Scott*, 3 T. R. 377.

(d) *Co. Litt.* *Richards v. Hodges*, 2 Saund. 84. *Dudlow v. Watchorn*, 16 East, 39. *Tolput v. Wells*, 1 M. & S. 395. *Fisher v. Pimbley*, 11 East, 188. *Winstone v. Linn*, 1 Barn. & Cress. 460. *Young v. Beck*, 5 Tyrw. 24. *Lacey v. Umbers*, *ibid.* 741. *Evans v. Elliott*, 2 Har. & W. 231. *Prince v. Brunatta*, 1 Bing. N. C. 435; 3 Dowl. 383, S. C. *Meyer v. Haworth*, 8 A. & E. 467. *Green v. James*, 6 M. & W. 656. [*Lawton v. Hickman*, 9 Q. B. 563. *Elliott v. Von Glehn*, 13 Q. B. 632. *Nevill v. Boyle*, 14 M. & W. 26. *Wright v. Burroughs*, 3 C. B. 685.] And see the numerous authorities collected in *Com. Dig. Pleader*, (F. 7), (F. 11); *Bac. Ab. Pleas*, &c. (L); *Vin. Ab. tit. Departure*; 1 Arch. 247, 358.

(e) Lord Coke defines it thus: "A departure in pleading is said to be, when the second plea containeth matter not pursuant to his former, and which fortifieth not the same; and therefore it is called *decessus*, because he departeth from his former plea." *Co. Litt.* 304 a.

Mr. Serjeant Williams gives the following definition: "A departure in pleading is said to be, when a man quits or departs from one defence which he has first made, and has recourse to another: — it is, when his second plea does not contain matter pursuant to his first plea, and which does not support and fortify it." 2 Wms. Saund. 84, n. (11).

example. In assumpsit, the plaintiffs, as executors, declared on several promises alleged to have been *made to the testator*, in his life-time. The defendant pleaded that she did not promise within six years, before the commencement of the action. The plaintiffs replied, that, within six years before the commencement of the action, the letters testamentary were granted to them; whereby the action accrued *to them the said plaintiffs*, within six years. The court held this to be a departure; as in the declaration they had laid promises to the *testator*, but in the replication, alleged the right of action to accrue to *themselves as executors*. (f) They ought to have laid promises to themselves as * executors, in the declaration, if they meant [* 453] to put their action on this ground.

But a departure has not occurred so frequently in the replication as in the *rejoinder*.

In debt on a bond conditioned to perform an award, so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators *did not make any award*. The plaintiff replied, that the arbitrators did make an award to such an effect; and that the same was tendered by the proper time. The defendant rejoined *that the award was not so tendered*. On demurrer, it was objected that the rejoinder was a departure from the plea in bar; "for, in the plea in bar, the defendant says that the arbitrators made no award; and now, in his rejoinder, he has implicitly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition, which is a plain departure; for it is one thing not to make an award, and another thing not to tender it when made. And, although both these things are necessary, by the

(f) *Hickman v. Walker*, Willes, 27.

condition of the bond, to bind the defendant to perform the award, yet the defendant ought only to rely upon one or the other, by itself," &c. — "but, if the truth had been that, although the award was made, yet it

was not tendered according to the condition, the

[*454] *defendant should have pleaded so at first, in his plea," &c. And the court gave judgment accordingly. (g) So, in debt on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, &c. of one Thomas Cook, the defendants pleaded *that they had kept the plaintiffs harmless*, (h) &c. The plaintiffs replied that Cook sued them; and so the defendant had not kept them harmless, &c. The defendants rejoined, *that they had not any notice of the damnification*. And the court held, first, that the matter of the rejoinder was bad, as the plaintiffs were not bound to give notice;—and, secondly, that the rejoinder was a departure from the plea in bar; for, in the bar, the defendants plead, that "they have saved harmless the plaintiffs, and in the rejoinder, confess that they have not saved harmless, but allege they had not notice of the damnification; which is a plain departure." (i) So, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which was, that the lessee, at every felling of wood, would make a fence,—the defendant pleaded *that he had not felled any wood*, &c. The plaintiff replied that he felled two acres of wood, but made no fence.

[*455] The defendant *rejoined *that he did make a fence*; this was adjudged a departure. (k)

(g) *Roberts v. Mariett*, 2 Saund. 188.

(h) This plea was bad, for not showing *how* they had kept harmless, (1 Wms. Saund. 117, n. (1), *suprà*, *p. 399); but the court held the fault cured by pleading over; vide *suprà*, *p. 160.

(i) *Cutler v. Southern*, 1 Saund. 116.

(k) *Dyer*, 253 b.

These, it will be observed, are cases in which the party deserts the ground, in point of *fact*, that he had first taken. But it is also a departure, if he puts the same facts on a new ground in point of *law*; as if he relies on the effect of the common law, in his declaration, and on a custom, in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder. Thus, where the plaintiff declared in covenant on an indenture of apprenticeship, by which the defendant was to serve him for seven years, and assigned as breach of covenant, that the defendant departed within the seven years,—and the defendant pleaded infancy,—to which the plaintiff replied that, by the custom of London, infants may bind themselves apprentices,—this was considered as a departure. (1) Again, in trespass, the defendant made title to the premises, pleading a *demise for 50 years*, made by the college of *R*. The plaintiff replied that there was another prior lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for 50 years; and alleged a proviso in the act of 31 Hen. VIII. c. 13, avoiding all leases by the colleges to which that act relates, made under such circumstances as the * lease last mentioned. The defendant, in his [* 456] rejoinder, pleaded another proviso in the statute, which allowed such leases to be good *for 21 years* if made to the same person, &c.; and that by virtue thereof, the demise stated in his plea was available for 21 years at least. The judges held the rejoinder to be a departure from the plea; “for in the bar, he pleads a lease of 50 years, and in the rejoinder, he concludes upon a lease for 21 years,” &c. And they observed,

(1) *Mole v. Wallis*, 1 Lev. 81.

that "the defendant might have shown the statute and the whole matter at first." (m)

To show more distinctly the nature of a departure, it may be useful on the other hand to give some examples of cases that have been held *not* to fall within that objection.

In debt on a bond conditioned to perform covenants, one of which was, that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied, that 26*l.* came to his hands, for which he had not accounted. The defendant rejoined, that he accounted *modo sequente*, viz. that certain malefactors broke into his counting-house and stole it, wherewith he acquainted

the plaintiff. And it was argued on demurrer, [*457] "that *the rejoinder is a departure; for fulfilling a covenant to account, cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting." But the court held, that showing he was robbed, is giving an account; and therefore there was no departure. (n) So in debt on a bond conditioned to indemnify the plaintiff from all tonnage of certain coals due to *W. B.*, the defendant pleaded *non damnificatus*; to which the plaintiff replied, that for 5*l.* of tonnage of coals due to *W. A.* his barge was distrained; and the defendant rejoined, that *no tonnage was due to W. B.* for the coals. To this the plaintiff demurred, "supposing the rejoinder to be a departure from the plea; for the defendant having pleaded generally that the plaintiff was not damnified, and the plaintiff having

(m) *Fulmerston v. Steward*, Plowd. 102; *Dyer*, 102 b., S. C. See also *Pascoe v. Pascoe*, 8 Bing. N. C. 904.

(n) *Vere v. Smith*, 2 Lev. 5; 1 Vent. 121, S. C.

assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach, which ought to have been done at first, and not after a general plea of indemnity. On the other side, it was insisted, that it was not necessary for the defendant to set out all his case at first, and it suffices that his bar is supported and strengthened by his rejoinder. And of this opinion was the court.”(o) Again, in an action of *trespass on the case for illegally [*458] taking toll, the plaintiff in his declaration set forth a charter of 26 Hen. VI. discharging him from toll. The defendant pleaded a statute resuming the liberties granted by Hen. VI. The plaintiff replied, that by the statute 4 Hen. VII. such liberties were revived; and this was held to be no departure.(p) Again, in an action of debt on a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators *did not make any award*; the plaintiff replied, that they duly made their award, setting part of it forth; and the defendant, in his rejoinder, set forth the whole award verbatim, by which it appeared that the award was bad in law, being made as to matters not within the submission. To this rejoinder the plaintiff demurred, on the ground that it was a departure from the plea,—for by the plea it had been alleged that there was no award, which meant no award in fact; but by the rejoinder it appeared that there had been an award in fact. The court, however, held that there was no departure; that the plea of no award, meant no legal and valid award according to the submission; and that consequently the rejoinder,

(o) *Owen v. Reynolds*, Fort. 841, cited Bac. Ab. Pleas, &c. p. 152, 5th edit.

(p) *Wood v. Hawkshead*, Yelv. 13.

in setting the award forth, and showing that it was not conformable to the submission, maintained the [*459] plea. (*q*) So in all * cases where the variance between the former and the latter pleading is *on a point not material*, there is no departure. Thus, in *assumpsit*, if the declaration, in a case where the time is not material, (*r*) state a promise to have been made on a given day, *ten years ago*, and the defendant plead that he did not promise within six years, the plaintiff may reply, that the defendant *did promise within six years* without a departure (*s*) because the time laid in the declaration was immaterial. (*t*)

The rule against departure is evidently necessary to prevent the retardation of the issue. For while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated, exhaust, after a few alternations of statement, the whole facts involved in the cause; and thereby develop the question in dispute. (*u*) But if a new [*460] ground be taken in any part of the * series, a new state of facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might, on the same principle,

(*q*) *Fisher v. Pimbley*, 11 East, 188; and see *Dudlow v. Watchorn*, * 16 East, 39. N. B. The first of these cases seems in effect to have overruled some former decisions. See *Morgan v. Mau*, 1 Sid. 180; *Raym.* 94, S. C. *Harding v. Holmes*, 1 Wils. 122. *Praed v. Duchess of Cumberland*, 4 T. R. 585; 2 Hen. Bl. 280; 2 Wms. Saund. 190, n. (*d*). *Young v. Beck*, 5 Tyrw. 24. *Cornish v. Keene*, 3 Bing. N. C. 570. *Hickes v. Cracknell*, 3 M. & W. 72.

(*r*) *Vide supra*, * p. 328.

(*s*) *Lee v. Rogers*, 1 Lev. 110. *Cole v. Hawkins*, 10 Mod. 348, S. P. See *Arnold v. Arnold*, 3 Bing. N. C. 81 acc.

(*t*) See also *Legge v. Evans*, 8 Dowl. 177; 6 M. & W. 86, S. C. *Arbonin v. Anderson*, 1 G. & D. 403.

(*u*) *Supra*, * pp. 64, 68.

shift their ground as often as they pleased; and an almost indefinite length of altercation might in some cases be the consequence. (*v*)

RULE II.

WHERE A PLEA AMOUNTS TO THE GENERAL ISSUE, IT SHOULD BE SO PLEADED. (*w*)

It has been explained, in a former part of the * work, that in most actions there is an [*461] appropriate form of plea, called the *general issue*,—fixed by ancient usage as the proper method of traversing the declaration, when the pleader means to deny the whole or the principal part of its allegations. (*y*) The meaning of the present rule is, that

(*v*) Vide 2 Wms. Saund. 84 a. n. (1).

(*w*) 16 Hen. VI. 16; 22 Hen. VI. 37; Co. Litt. 303 b.; Doct. & Stud. 271, 272; Com. Dig. Pleader, (E. 14); Bac. Ab. Pleas, &c. 370 to 376, 5th edit. For instances of what plea amounts to the general issue in *assumpsit*, see *Solly v. Neish*, 4 Tyr. 625; 4 Dowl. 248, S. C. *Gregory v. Hartnoll*, 1 Tyr. & G. 303; 4 Dowl. 695, S. C. *Worrall v. Grayson*, *ibid.* 477; 4 Dowl. 719, S. C. *Jones v. Nanney*, Tyr. & G. 634; 5 Dowl. 90, S. C. *Heyselden v. Staff*, 2 Har. & W. 204; 5 A. & E. 153, S. C. *Morgan v. Pebrer*, 3 Bing. N. C. 457. *Hill v. Allen*, 5 Dowl. 471; 2 M. & W. 283, S. C. *Brind v. Dale*, 2 M. & W. 775. *Smith v. Dixon*, 7 A. & E. 1. *Maude v. Meersham*, 6 Dowl. 570. *Francis v. Baker*, 10 A. & E. 642. *Wood v. Smith*, 7 Dowl. 214. *Prentice v. Elliott*, 7 Dowl. 819; 5 M. & W. 606. *Cleworth v. Pickford*, 7 M. & W. 314; 8 Dowl. 873, S. C. *Kemble v. Mills*, 1 M. & G. 757; 9 Dowl. 446, S. C. *Leaf v. Tuton*, 10 M. & W. 393. For what does not amount to *non-assumpsit*, see *Smart v. Hyde*, 8 M. & W. 723; 1 Dowl. N. S. 60. For what pleas amount to *nunquam indebitatus*, *Dicken v. Neale*, 5 Dowl. 176; 1 M. & W. 556, S. C. *Collingbourne v. Mantell*, 7 Dowl. 518. *Payne v. Hales*, 5 M. & W. 598; 7 Dowl. 859, S. C. To not *guilty* in *case*, *Gough v. Bryan*, 2 M. & W. 770; 5 Dowl. 765, S. C. *Armitage v. Grand Junction Railway Company*, 8 M. & W. 244; 6 Dowl. 340, S. C. *Rowe v. Ames*, 6 M. & W. 747; 8 Dowl. 750, S. C. To not *guilty* in *trespass*, *Allan v. Gomme*, 11 A. & E. 759; 3 P. & D. 581, S. C.

(*y*) *Suprà*, *p. 169.

if instead of traversing the declaration in this form, the party pleads, in a more special way, matter which is constructively and in effect the same as the general issue, such plea will be bad; and the general issue ought to be substituted.

Thus, to a declaration in trespass for entering the plaintiff's garden, the defendant pleaded *that the plaintiff had no such garden*. This was ruled to be "no plea; for it amounts to nothing more than *not* guilty; for if he had no such garden then the defendant is not guilty." So the defendant withdrew his plea, and said *not guilty*. (z) So in trespass for depasturing the plaintiff's herbage, that the defendant *did not depasture, &c.*, is no plea; it should be *not guilty*. (a) So in debt for the price of a horse sold, *that the defendant did not buy*, is no plea, for it amounts to *never indebted*. (b) Again, [*462] in debt on a bond, the *defendant by his plea confessed the bond, but said that it was executed to another person than the plaintiff; this was bad, as amounting to *non est factum*. (c)

These examples show that a special plea, thus improperly substituted for the general issue, may be sometimes in a *negative*, sometimes in an *affirmative* form. When in the *negative*, its *argumentativeness* (d) will often serve as an additional test of its faulty quality. Thus the plea in the first example, "that the plaintiff had no such garden," is evidently but an argumentative allegation, that the defendant did not commit because he *could* not have committed the trespass. This, how-

(z) 10 Hen. VI. 16.

(a) Doct. Pl. 42, cites 22 Hen. VI. 37.

(b) Vin. Ab. Certainty in Pleadings, (E. 15); cites Bro. Traverse, &c. pl. 275; 22 Edw. IV. 29.

(c) Gifford v. Perkins, 1 Sid. 450; 1 Vent. 77, S. C.

(d) See the rule against argumentativeness, *suprà*, *p. 422.

ever, does not universally hold; for in the second and third examples, the allegations that the defendant "did not depasture," and "did not buy," seem to be in as direct a form of denial as that of *not guilty*. If the plea be in the *affirmative*, the following considerations will always tend to detect the improper construction. If a good plea, it must (as formerly shown) be taken either as a traverse, or as in confession and avoidance. (e) Now, taken as a traverse, such a plea is clearly open to the objection of *argumentative-ness*; for *two affirmatives make an argu- [*463] mentative issue. (f) Thus, if in an action on a bond, the defendant plead, that it was executed to another person, *J. S.*, it is an argumentative denial that it was executed to the plaintiff, and the denial should have been in the direct form *non est factum*. On the other hand, if a plea of this kind be intended by way of confession and avoidance, it is bad *for want of colour*; (g) for it admits no apparent right in the plaintiff.

It will be recollected that by the late rules of court, Hil. T. 4 Will. IV. the effect of the general issue has been materially qualified and restrained. (h) Since that period the following points have been decided in illustration of the rule now under consideration. (i)

In debt for goods sold, the defendant pleaded as to part of the demand, that it was the residue of a larger sum agreed to be paid for a boat, which the plaintiff had warranted sound; that the boat had proved unsound, and only worth a certain sum, which had been paid to the plaintiff at the time of sale. The court

(e) Vide *suprà*, *pp. 57, 150.

(f) Vide *suprà*, *p. 424.

(g) Vide *suprà*, *p. 223.

(h) Vide *suprà*, *p. 173.

(i) Et vide *suprà*, *pp. 175, 179, 184.

held the plea bad, as amounting to the general issue of
 “never indebted.” (j)

[*464] *In assumpsit for money had and received
 by the defendant to the plaintiff’s use, the
 defendant pleaded that the money so received was the
 amount of certain goods consigned to him as a security
 for any advances he might make, with a power of sale
 to reimburse himself, and that he sold the goods accord-
 ingly. The plea was held bad on the same ground. (k)

In assumpsit for money paid by the plaintiff to the
 defendant’s use, he pleaded that the money alleged to
 be so paid was paid as his proportion of certain dam-
 ages recovered against the plaintiff as owner of a
 vessel, of which defendant was also part owner, for
 negligence in the carriage of goods on board thereof;
 but that he did not concur with the plaintiff and the
 other part owners in such employment of the vessel,
 and that they alone were concerned in the adventure.
 This plea was also open to the same objection. (l)

In a like action, the same doctrine was held as to a
 plea that the plaintiff and defendant carried on business
 in co-partnership, and that the alleged causes of action
 arose out of transactions between them in their capacity
 of partners, and that the accounts of the partnership
 were still unsettled. (m)

[*465] *In assumpsit for work and labour done, the
 same objection has been allowed, in respect of
 a plea, that the work was done under a contract that no
 remuneration should be claimed except for money out of

(j) *Dicken v. Neale*, 5 Dowl. 176. [Other cases where a special plea
 was held bad as amounting to the general issue are *Selby v. Browne*, 7
 Q. B. 620; *Jacobs v. Fisher*, 1 C. B. 178.]

(k) *Solly v. Neish*, 4 Tyrw. 625.

(l) *Gregory v. Hartnoll*, 1 Tyr. & G. 303.

(m) *Worrall v. Grayson*, 1 Tyr. & G. 477.

pocket. (*n*) And also in respect of a plea, that the work was done under a contract that no remuneration should be claimed if the work should turn out to be useless, and that it had done so: (*o*) and also in respect of a plea, that the plaintiff did the work so unskilfully that it was useless to the defendant. (*p*)

It is said, that the court is not bound to allow this objection; but that it is in its discretion to allow a special plea amounting to the general issue, if it involve such matter of law as might be unfit for the decision of a jury. (*q*) It is also said, that as the court has such discretion, the proper method of taking advantage of this fault is not by *demurrer*, but by motion to the court, to set aside the plea, and enter the general issue instead of it. (*r*) * In modern practice, however, this objection has always been allowed upon demurrer. (*rr*)

As a plea amounting to the general issue is usually open also to the objection of being *argumentative* or that of *wanting colour*, we sometimes find the rule in question discussed as if it were founded entirely in a view to those objections. This, however, does not seem to be a sufficiently wide foundation for the rule; — for there are instances of pleas which are faulty as amounting to the general issue, which yet do not (as already observed)

(*n*) *Jones v. Nanney*, Tyr. & G. 634; 5 Dowl. 90; 1 M. & W. 383, S. C.

(*o*) *Hayselden v. Staff*, 2 Har. & W. 204; 5 A. & E. 153, S. C.

(*p*) *Hill v. Allen*, 5 Dowl. 471; 2 M. & W. 283, S. C.

(*q*) Bac. Ab. Pleas, &c. p. 374, 5th edit. *Birch v. Wilson*, 2 Mod. 274. *Carr v. Hinchliff*, 4 Barn. & Cress. 547. *Hussey v. Jacob*, 1 Ld. Raym. 87. *James v. Fowks*, 12 Mod. 101. *Maggs v. Ames*, 1 M. & P. 294; 4 Bing. 470, S. C. *Hammond v. Teague*, 6 Bing. 197; 3 M. & P. 474, S. C.; and see Lawes on Pleading, 129.

(*r*) *Warner v. Wainsford*, Hob. 127. *Ward and Blunt's case*, 1 Leon. 178.

(*rr*) And see *Leaf v. Tuton*, 10 M. & W. 393; 2 Dowl. N. S. 300, S. C.

seem fairly open to the objection of argumentativeness (*s*)—and which, on the other hand, being of the negative kind or by way of traverse,—require no colour. Besides, there is express authority for holding, that the true object of this rule is, to *avoid prolixity*;—and that it is therefore properly classed under the present section. For it is laid down, that “the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause.” (*t*)

[*467]

* RULE III.

SURPLUSAGE IS TO BE AVOIDED. (*u*)

Surplusage is here taken in its large sense, as including *unnecessary matter* of whatever description. (*x*) To combine with the requisite certainty and precision the greatest possible *brevity*, is now justly considered as the perfection of pleading. This principle, however, has not been kept uniformly in view at every era of the science. Although it appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent interval of our legal history; (*y*) and it is to the wisdom of modern judges that it owes its revival and restoration.

(*s*) Suprà, *p. 462.

(*t*) Warner v. Wainsford, Hob. 127; see also Com. Dig. Pleader, (E. 13) per cur. Gough v. Bryan, 2 M. & W. 774.

(*u*) Bristow v. Wright, Doug. 667; 1 Wms. Saund. 233, n. (2). Yates v. Carlisle, 1 Black. Rep. 270; Bac. Ab. Pleas, &c. (I.) 4; Doct. Pl. 338.

(*x*) In its more strict and confined meaning, it imports matter wholly foreign and irrelevant.

(*y*) See the remarks of Sir M. Hale, Hist. of Com. Law, c. vii. viii.

1. The rule as to avoiding surplusage may be considered, first, as prescribing the omission of matter *wholly foreign*. An example of the violation of the rule in this sense, occurs, when a plaintiff, suing a defendant upon one of the covenants in a long deed, sets out in his declaration not only the covenant on which he sues, but all the other *covenants, though [*468] relating to matters wholly irrelevant to the cause. (z)

2. The rule also prescribes the omission of matter which, though not wholly foreign, *does not require to be stated*. Any matters will fall within this description, which, under the various rules enumerated in a former section, as tending to limit or qualify the degree of certainty, (a) it is unnecessary to allege; — for example, matter of mere *evidence*, — matter of *law*, — or other *things which the court officially notices*, — matter *coming more properly from the other side*, — matter *necessarily implied*, &c.

3. The rule prescribes generally the cultivation of *brevity*, or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners in pleading; and is considered as indicative of a good school.

Surplusage, however, is not a subject for *demurrer*; — the maxim being that utile, per inutile, non vitiat. (b) But when any flagrant fault of *this [*469]

(z) *Dundass v. Lord Weymouth*, Cowp. 665. *Price v. Fletcher*, ibid. 727. *Phillips v. Fielding*, 2 H. Bl. 181.

(a) Vide *suprà*, *pp. 379-413.

(b) Co. Litt. 303 b.; Plow. Com. 232. *Lord v. Houston*, 11 East, *62. *Cobbett v. Cochrane*, 8 Bing. 17. *Reynolds v. Welsh*, [*469] 5 Tyr. 202. *Bacon v. Ashton*, 5 Dowl. 94. *Lewis v. Lyster*, 1

kind occurs, and is brought to the notice of the court, it is visited with the censure of the judges. (c) They have also in such cases, on motion, referred the pleadings to their officer, that he might strike out such matter as is redundant, and capable of being omitted without injury to the material averments; and in a clear case will themselves direct such matter to be struck out. And the party offending will sometimes have to pay the costs of the application. (d)

This is not the only danger arising from surplusage.

Though traverse cannot be taken (as elsewhere shown) on an immaterial allegation, (e) yet it often happens that when material matter is alleged with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected, as to be incapable of separation, and the opposite [*470] party is *therefore entitled to include, under his traverse, the whole matter alleged. (f) The consequence evidently is, that the party who has pleaded with such unnecessary particularity, has to sustain an increased burthen of proof, and incurs great danger of failure at the trial.

Most of the principal rules of pleading have now been classed, in reference to certain common objects which each class or set of rules is conceived to contemplate; and have been explained and illustrated in their con-

Tyr. & G. 185. *Alderson v. Johnson*, 2 M. & W. 70; 5 Dowl. 294, S. C. *Palmer v. Gooden*, 8 M. & W. 890; 1 Dowl. N. S. 673, S. C.

(c) *Yates v. Carlisle*, 1 Black. 270. *Price v. Fletcher*, Cowp. 727.

(d) *Price v. Fletcher*, Cowp. 727. *Bristow v. Wright*, Doug. 667; 1 Tidd, 667, 8th edit. *Nichol v. Wilton*, 1 Chit. Rep. 449, 450. *Carmack v. Gundry*, 3 Barn. & Ald. 272. *Brindley v. Dennett*, 2 Bing. 184. *Alderson v. Johnson*, 5 Dowl. 294; 2 M. & W. 70, S. C.

(e) *Suprà*, *p. 275.

(f) *Vide suprà*, *p. 282.

nection with these objects, and with each other. But there still remain certain rules, also of a principal or primary character, which have been found not to be reducible within this principle of arrangement, being in respect of their objects, of a miscellaneous and unconnected kind. These will form the subject of the following section.

SECTION VII.

OF CERTAIN MISCELLANEOUS RULES.

These rules relate either to the *declaration*, the *plea*, or *pleadings in general*; and shall be considered in the order thus indicated.

*RULE I.

[*471]

THE DECLARATION MUST BE CONFORMABLE TO THE ORIGINAL WRIT. (*g*)

This is a rule of high antiquity, being laid down by Bracton, (*h*) who wrote in the reign of Hen. III., a period at which the system of pleading was in a very rude and imperfect state.

This rule, however, is no longer of any practical importance. For since the recent abolition of the original writ in personal suits, it is applicable only to the few remaining actions of the real and mixed class. And even in these, it is not now capable of being enforced. For if the declaration varied from the original, the only modes of objecting to the variance were by plea in abatement, or by writ of error. (*i*) But by a change of practice, explained in the first chapter, a plea in

(*g*) Com. Dig. Pleader, (C. 18); Bac. Ab. Pleas, &c. (B. 4); Co. Litt. 303 a.; Bract. 431 a., 435 b.

(*h*) Bract. ubi *suprà*.

(*i*) 1 Saund. 818, n. (3).

abatement in respect of such variance can now no longer be pleaded; (*k*) and by the statutes of jeofails and amendments, the objection cannot now be taken by way of writ of error after verdict; nor if [*472] the variance be in a matter of *form* only, * can it be taken after judgment by confession, nil dicit, or non sum informatus. (*l*) However, the effect of the rule is still felt in pleading, and that in personal as well as other actions; for its long and ancient observance had fixed the frame and language of the declaration in conformity with the original writ, in each form of suit; and by a rule, which has already been considered, to depart from the known and established tenor of pleadings is a fault; (*m*) consequently a declaration is still framed in conformity with the language of the original writ once appropriate to the form of action, as much as when a variance from the writ actually sued out, might have become the subject of a plea in abatement. (*n*)

RULE II.

THE DECLARATION SHOULD HAVE ITS PROPER COMMENCEMENT, AND SHOULD IN CONCLUSION LAY DAMAGES, AND ALLEGE PRODUCTION OF SUIT.

The form of *commencement* (which in personal actions is fixed by Rule of Court, M. T. 3 Will. IV.) [*473] * will be found among the examples in the first chapter.

(*k*) Suprà, * pp. 55, 56.

(*l*) 5 Geo. I. c. 13; 21 Jac. I. c. 13; 4 Anne, c. 16; see 2 Tidd, 958, 959, 8th edit.; 1 Wms. Saund. 318, n. (3).

(*m*) Vide suprà, * p. 431.

(*n*) If the declaration in personal actions does not correspond with the writ, it may be set aside for irregularity, see *Fowler v. Rickerby*, 2 M. & G. 760.

Since that Rule of Court, the proper mode of taking any objection to the form of commencement in a declaration, seems to be not that of demurrer, but of motion to the court to set the declaration aside, as irregular. (*o*)

As to the *conclusion* ; First, the declaration must lay *damages*.

In *personal* (*p*) and *mixed* actions, (though not in an action purely *real*;) the declaration must allege in conclusion, that the injury is to the *damage* of the plaintiff, and must specify the amount of that damage. (*q*) In *personal* actions there is the distinction, formerly explained, between actions that *sound in damages*, and those that do not ; (*r*) but in either of these cases it is equally the practice to lay damages. There is however this difference, that in the former case damages are the main object of the suit, and are, * there- [* 474] fore, always laid high enough to cover the whole demand ; but in the latter, the liquidated debt or the chattel demanded being the main object, damages are claimed in respect of the *detention* only of such debt or chattel, and are therefore usually laid at a small sum.

The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration. (*s*)

(*o*) *Dod v. Grant*, 4 A. & E. 485. *Thompson v. Dicaa*, 3 Tyr. 873. *Harper v. Chumneys*, 2 Dowl. 680. *Neale v. Richardson*, 2 Dowl. 89. *Alderson v. Johnson*, 5 Dowl. 294. *Reynolds v. Welsh*, 6 Tyr. 202.

(*p*) But *penal* actions are an exception. *Cuming v. Sibley*, 4 Burr. 2489.

(*q*) Com. Dig. Pleader, (C. 84). *Robert Pilford's case*, 10 Rep. 116 b., 117 a. b. ; *Booth*, 74.

(*r*) *Vide supra*, * p. 117.

(*s*) Com. Dig. Pleader, (C. 84) ; *Damages*, (E. 3) ; *Vin. Ab. Damages*, (R) ; *Robert Pilford's case*, 10 Rep. 117 a. b. *Watkins v. Morgan*, 6 C. & P. 661.

Secondly, the declaration should also conclude with the *production of suit*.

This applies to actions of all classes, real, personal and mixed.

In ancient times the plaintiff was required to establish the truth of his declaration in the first instance, and before it was called into question upon the pleading, — by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his [*475] allegations. (t) *The practice of thus producing a *secta* gave rise to the very ancient formula almost invariably used at the conclusion of a declaration, — *et inde producit sectam*; (u) and though the actual production has for many centuries fallen into disuse, the formula still remains. (v) Accordingly, except the count in dower, all declarations constantly conclude thus — “And therefore he brings his suit,” &c. The count in dower concludes without any production of suit; a peculiarity which appears always to have belonged to that action. (w)

(t) See Bract. 214 b. *Et inde statim producat* (i. e. after the declaration in an action of prohibition) *sectam sufficientem, duos ad minus, vel tres, vel plures, si possit*. Ibid. 410 a. “*Producit sectam* was proffering to the court the testimony of the witnesses or followers.” Gilb. C. P. 48, see Appendix, NOTE 61.

(u) See the entries in the *Placitorum Abbreviatio* passim temp. Ric. I., Ed. II.

(v) As early as 7 Edw. II. it had become a mere form; for it is said in a case reported of that year, *cest court* (i. e. the Common Pleas) *ne soeffre mye la sute estre examine*, 7 Edw. II. 242.

(w) Booth & Co. Ent. tit. Dower.

RULE III.

PLEAS MUST BE PLEADED IN DUE ORDER. (y)

The order of pleading, as established at the present day, is as follows : —

Pleas

1. To the jurisdiction of the court.
2. To the disability of the person. {
 1. Of plaintiff.
 2. Of defendant.
- * 3. To the count or declaration. [* 476]
4. To the writ. (z)
5. To the action itself, — in bar thereof. (a)

In this order the defendant may plead all these kinds of pleas successively. Thus, he may first plead to the jurisdiction, and upon demurrer and judgment of respondeat ouster thereon, (b) may resort to a plea to the disability of the person; and so to the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus, he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person. (c)

So he cannot vary the order; — for by a plea of any of these kinds, he is taken to waive or renounce all pleas of a kind prior in the series.

(y) Year-book, 35 Hen. VII. 12. Co. Litt. 303 a.; *Longueville v. Thistleworth*, *Ld. Raym.* 970.

(z) The 2d, 3d, and 4th of these divisions belong, it will be recollected, to the class of pleas in abatement. Vide *suprà*, * p. 52. Those to the writ, are pleas in abatement founded on some objection to the form of the original writ; a species which cannot now occur.

(a) Year-book, 35 Hen. VI. 12; *Com. Dig.* Abatement, (C.); 1 Chitty, 425; see Appendix, NOTE 62.

(b) As to this judgment, vide *suprà*, * p. 116.

(c) *Com. Dig.* Abatement, (I. 3); *Bac. Ab.* Abatement, (O.).

And, if issue *in fact* be taken upon any plea, though of the dilatory class only, the judgment on [*477] such issue (as elsewhere explained) either * terminates, or (in case of a plea of suspension) suspends the action ; (*d*) so that he is not at liberty, in that case, to resort to any other kind of plea.

RULE IV.

PLEAS IN ABATEMENT MUST GIVE THE PLAINTIFF A BETTER WRIT OR DECLARATION. (*e*)

The meaning of this rule is, that in pleading a mistake of form, in abatement of the writ or declaration, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection, in framing his new writ or declaration. (*f*) Thus, if a misnomer in the Christian name of the defendant be pleaded in abatement, (a case that may still occur in a real action), (*g*) the defendant must, in such plea, show what his true Christian name is, and even what is his true surname, (*h*) and this, though the true surname be already stated in the declaration ; lest the plaintiff should, a second time, be defeated by error in the name. For these pleas, as tending to delay justice, are not [*478] favourably considered in law, — and the * rule in question was adopted in a view to check the repetition of them.

This condition of requiring the defendant to give a

(*d*) Vide *suprà*, * pp. 52, 116.

(*e*) Com. Dig. Abatement, (l. 1). *Evans v. Stevens*, 4 T. R. 227. *Mainwaring v. Newman*, 2 Bos. & Pul. 120. *Haworth v. Spraggs*, 8 T. R. 515. *Earl of Stirling v. Clayton*, 3 Tyrw. 157.

(*f*) See Appendix, NOTE 63.

(*g*) *Suprà*, * p. 338.

(*h*) *Haworth v. Spraggs*, 8 T. R. 515.

better writ, &c. is often a criterion to distinguish whether a given matter should be pleaded in *abatement* or in *bar*. (*i*) The latter kind of plea, as impugning the right of action altogether, can of course give no better writ or declaration, — for its effect is to deny that, under any form of writ or declaration, the plaintiff could recover in such action. If, therefore, a better writ or declaration can be given, this shows that the plea ought not to be in bar, but in abatement.

It may also be laid down as a rule, that —

RULE V.

DILATORY PLEAS MUST BE PLEADED AT A PRELIMINARY STAGE OF THE SUIT.

For dilatory pleas are in general not allowable after *oyer*, (*k*) nor after a *plea in bar*. (*l*) And besides these, there are other proceedings also, which have the effect of excluding a subsequent dilatory *plea, — [*479] but being of a less ordinary and general kind, it is not necessary here to notice them more distinctly. (*m*)

RULE VI.

ALL AFFIRMATIVE PLEADINGS WHICH DO NOT CONCLUDE TO THE COUNTRY MUST CONCLUDE WITH A VERIFICATION. (*n*)

Where an issue is tendered, to be tried by jury, it has been shown that the pleading concludes *to the country*. (*o*)

(*i*) 1 Wms. Saund. 284, n. (4). *Evans v. Stevens*, 4 T. R. 227.

(*k*) Com. Dig. Abatement, (I. 22).

(*l*) Ibid. (I. 23).

(*m*) See the instances Com. Dig. Abatement, (I. 26), &c.; see Appendix, NOTE 64.

(*n*) Com. Dig. Pleader, (E. 32), (E. 33); Co. Litt. 303 a.; Finch, Law, 359. *Snow v. Stevens*, 2 Dowl. 664. *Goodchild v. Pledge*, 2 Gale, 7.

(*o*) Vide *suprà*, *p. 264.

In all other cases, pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verification*, or an *averment*. The verification is of two kinds, — *common* and *special*. The common verification is that which applies to ordinary cases, and is in the following form: “And this the plaintiff” (or defendant) “is ready to verify.” (*p*) The special verifications are used only where the matter pleaded is intended to be tried by record, or by some other method than a jury.

They are in the following forms: — “And this [*480] the plaintiff” *(or defendant) “is ready to verify by the said record,” or, “And this the plaintiff” (or defendant) “is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint.” (*q*)

The origin of this rule is as follows: —

It was a doctrine of the ancient law, little, if at all, noticed by modern writers, that every pleading, affirmative in its nature, must be supported by an offer of some *mode of proof*; (*r*) and the reference to a jury, (who, as formerly explained, were in the nature of witnesses to the fact in issue) (*s*) was considered as an offer of *proof*, within the meaning of that doctrine. (*t*) When the proof proposed was that by jury, the offer was made in the *vivâ voce* pleading, by the words *prest d'averrer*, or *prest*, &c., (*u*) which, in the record, was translated, *Et hoc paratus est verificare*. (*x*) On the other hand, where other

(*p*) See the various examples of pleadings given in the course of this work.

(*q*) Vide *suprà*, * pp. 265, 266.

(*r*) See Appendix, NOTE 65.

(*s*) Vide *suprà*, * p. 145.

(*t*) See Appendix, NOTE 66.

(*u*) See Appendix, NOTE 67.

(*x*) See 10 Edw. III. 23; *ibid.* 25; and the Year-books *passim*.

modes of proof were intended, the record ran, *Et hoc paratus est verificare per recordum*, or, *Et hoc paratus est verificare quocunque modo curia consideraverit.* (y) * But while these were the forms [*481] in general observed, there was the following exception, that on the *attainment of an issue*, to be tried by jury, the record marked that result by a change of phrase, and substituted for the verification, the conclusion *ad patriam* — to the *country*. (z) The written pleadings (which, it will be remembered, are framed, in general, according to the ancient style of the record), (a) still retain the same formulæ in these different cases, and with the same distinctions as to their use. They preserve the conclusion to the country, to mark the attainment of an issue triable by jury, but in other cases conclude with a translation of the old Latin phrase, *Et hoc paratus*, &c.: and hence the rule — that an affirmative pleading that does not conclude to the country, must conclude with a verification. (b)

As the ancient rule requiring an offer of proof extended only to *affirmative* pleadings (those of a *negative* kind being in general incapable of proof), so the rule now in question applies to the former only, no verification being in general *necessary* in * a [*482] negative pleading; (c) but it has, nevertheless, been the practice to conclude with a verification all

(y) In the pleading, this was expressed thus: *prest d'averrer ou devomus*, 40 Edw. III. 20.

(z) See 10 Edw. III. 25, 26, &c.

(a) Vide *suprà*, * pp. 28, 29.

(b) "Every plea or bar, replication, &c. *must be offered to be proved true*, by saying in the plea, *Et hoc paratus est verificare*, — which we call an averment." Finch, Law, 359. This gives confirmation, it will be observed, to the account of the origin of this rule contained in the text.

(c) Co. Litt. 303 a. *Milner v. Crowdall*, 1 Show. 338. *Bodenham v. Hill*, 7 M. & W. 274; 8 Dowl. 862, S. C.

negative as well as affirmative pleadings that do not conclude to the country.

The rule in question has no longer any value or meaning as regards the object it originally proposed; for till the trial of the issue it is no longer necessary for either party now to refer to his proofs, but as a rule of form it is attended with convenience, as serving to mark whether the pleading be intended to amount to a tender of issue.

RULE VII.

IN ALL PLEADINGS WHERE A DEED IS ALLEGED, UNDER WHICH THE PARTY CLAIMS OR JUSTIFIES, PROFERT OF SUCH DEED MUST BE MADE. (d)

Where a party pleads a deed, and claims or justifies under it, the mention of the instrument is accompanied with a formula to this effect: — “one part of which said indenture” (or other deed), “sealed with the seal of the said —, the said — now brings here into court, the date whereof is the day and year aforesaid.” (e)

[*483] * This formula is called *making profert* of the deed. Its present practical import is, that the party has the instrument ready for the purpose of giving oyer; (f) and at the time when the pleading was *vivâ voce*, it implied an *actual production* of the instrument in *open court* for the same purpose.

The rule in general applies to *deeds* only. No *profert* therefore is necessary of any written agreement or other instrument not under seal, (g) nor of any instrument

(d) Com. Dig. Pleader, (O. 1); *Leyfield's case*, 10 Rep. 92 a.

(e) See the example, *suprà*, * p. 37.

(f) As to oyer, see * pp. 73, 74.

(g) Com. Dig. Pleader, (O. 3). *Aylesbury v. Harvey*, 3 Lev. 205.

which, though under seal, does not fall within the technical definition of a *deed*; as, for example, a sealed will or award. (*h*) This, however, is subject to exception in the case of letters testamentary and letters of administration; — executors and administrators being bound when plaintiffs (*i*) to support their declaration, by making profert of these instruments.

The rule applies only to cases where there is occasion to *mention the deed in pleading*. When the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary, even though in fact it may be the foundation of the case or title pleaded.

* The rule extends only to cases where the [*484] party *claims* under the deed, or *justifies* under it; and therefore when the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to show right or title in the party pleading, but for some collateral purpose, no profert is necessary. (*k*)

The rule is also confined to cases where the party relies on the *direct and intrinsic operation of the deed*. (*l*) Thus, in pleading a feoffment, no profert is necessary, for the estate passes not by the deed, but the livery. So, in pleading a conveyance by lease and release under the Statute of Uses, it is not necessary to make profert of the lease, because it is the *statute* that gives effect to

(*h*) Com. Dig. Pleader, (O. 3); 2 Wms. Saund. 62 b., n. (5).

(*i*) But semb. that they are not bound to make profert where they have occasion to plead the letters testamentary, &c. as *defendants*. See *Marsh v. Newman*, 163, 4; cites 36 Hen. VI. 36.

(*k*) *Bellamy's case*, 6 Rep. 38 a. *Holland v. Shelley*, Hob. 303. *Banfill v. Leigh*, 8 T. R. 571; Com. Dig. Pleader, (O. 8), (O. 16); 1 Wms. Saund. 9 a., n. (1). [*Lord Newborough v. Schröder*, 7 C. B. 342.]

(*l*) *Read v. Brookman*, 3 T. R. 156.

the bargain and sale for a year, and the deed does not intrinsically establish the title. But in pleading the release, profert ought to be made, as the same reason does not apply. (*m*)

Another exception to the rule obtains where the deed is *lost* or *destroyed* through time or accident, [*485] *or is *in the possession of the opposite party*. (*n*)

These circumstances dispense with the necessity of a profert; and the formula is then as follows: — “Which said writing obligatory,” (or other deed,) “having been lost by lapse of time,” (or “destroyed by accidental fire,” or, “being in the possession of the said —”) “the said — cannot produce the same to the court here.” (*o*)

Again, a party is not bound to make profert of an instrument to the possession of which he is not entitled. (*p*)

The reason assigned for the rule requiring profert is, that the court may be enabled by inspection to judge of the sufficiency of the deed. (*q*) The author, however, presumes to question whether the practice of making profert *originated* in any view of this kind. It will be recollected, that by an ancient rule, all affirmative pleadings were formerly required to be supported by

(*m*) Jenkin v. Peace, 6 M. & W. 722.

(*n*) Read v. Brookman, 3 T. R. 156. Carver v. Pinkney, 3 Lev. 82. As to what is not a sufficient excuse of profert, see Wallis v. Harrison, 4 M. & W. 538. Hill v. Marsden, 6 M. & W. 718. [Hodgson v. Warden, 13 M. & W. 22.] The excuse of profert may be traversed; see an instance of a bad traverse, Fisher v. Ford, 12 A. & E. 654; 4 P. & D. 347.

(*o*) 2 Chitty, 153, 1st edit.

(*p*) Dangerfield v. Thomas, 9 A. & E. 292; 1 P. & D. 287, S. C. [Thames Haven Dock Co. v. Brymer, 5 Ex. 696.] Bain v. Cooper, 8 M. & W. 751; 1 Dowl. N. S. 11, S. C. See the exceptions to this last rule in the judgment of Parke, B., in the last cited case.

(*q*) Leyfield's case, 10 Rep. 92 b.; Co. Litt. 35 b.

an offer of *some mode of proof. (r) As the [*486] pleader, therefore, of that time, concluded in some cases by offering to prove by jury, or by the record, so in others he maintained his pleading by producing a *deed* as proof of the case alleged. In so doing, he only complied with the rule that required an offer of proof. Afterwards the trial by jury becoming more universally prevalent, it was often applied, as at the present day, to determine questions arising as to the genuineness or validity of the deed itself so produced; and from this time, a deed seems to have been no longer considered as a method of proof, distinct and independent of that by jury. Consequently it became the course to introduce as well in pleadings where the party relied on a deed, as in other cases, the common *verification*, or offer to prove by *jury*; and the true object of the profert was in this manner not only superseded but forgotten, though in practice it still continued to be made. (s)

The actual value of the rule, whatever its origin or ancient object, consists in enabling the adverse party to obtain inspection (by demanding oyer) of the instrument of which profert is made. Where the instrument is such that no profert needs be made of it, he has no such means of obtaining *inspection, and [*487] he is therefore obliged to resort to the less convenient course of applying to a judge for an order that inspection be granted. But an order of this kind will in general be made as a matter of course, with respect to all instruments which either party sets forth in the pleading, and which are of such a kind as not to require profert.

(r) Vide *suprà*, *p. 480.

(s) See Appendix, NOTE 68.

RULE VIII.

ALL PLEADINGS MUST BE PROPERLY ENTITLED. (t)

The manner of entitling the pleadings has been recently fixed by rule of court. By rule M. T. 3 Will. IV., it is provided, that every *declaration* shall in future be entitled in the proper court, and of the day of the month, and year, when it is filed or delivered. And by rule H. T., 4 Will. IV., every *pleading* as well as the declaration shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date. Of the manner of entitling conformably to the rules, examples have been given in the different specimens of pleading inserted in this work.

[*488]

RULE IX.

ALL PLEADINGS OUGHT TO BE TRUE. (u)

While this rule is recognised, it is at the same time to be observed, that in general there is no means of *enforcing* it, because regularly there is no proper way of proving the falsehood of an allegation, till issue has been taken, and trial had upon it.

Persons engaged in vexatious defences have taken advantage of this difficulty, by resorting to the practice of what is called *sham pleading*, that is, pleading, for the mere purpose of delay, a matter which the pleader knows to be false.

The plea that has been most commonly adopted for this purpose is the plea of *judgment recovered*. But to

(t) 1 Chitty, 261, 527, 528, 1st edit.; 1 Arch. 72, 162. *Topping v. Fuge*, 1 Marsh. 341.

(u) Bac. Ab. Pleas, &c. (G. 4). *Slade v. Drake*, Hob. 295. *Smith v. Yeomans*, 1 Saund. 816. See 3 Edw. I. Cap. 29; 2 Inst. 213, 215.

prevent that use of it for the future, it has been lately ordered, by Rule Hil. 4 Will. IV., that in the margin of that plea shall be always stated the date of the judgment, and if it be in a court of record, the number of the roll in which the proceedings are entered; in default of which the plaintiff shall be at liberty to sign judgment. In *other cases, if a plea contain [*489] very improbable matter, and the frame of it is subtle and intricate, so as to lead to the inference that it is pleaded for a dilatory purpose, the court will, *on motion*, supported by affidavit of its falsehood, allow judgment to be signed by the plaintiff as for want of plea, and make the defendant or his attorney pay the costs. (v) And the court has in all cases power to punish for sham pleading, and has often strongly censured the practice.

It may be further remarked under this head, that in order to prevent the use of pleas in *abatement* for a dilatory purpose, it is provided by 4 Anne, c. 16, s. 11, that pleas of that class must be verified by affidavit, or some probable matter must be shown to the court, tending to prove them true.

Lastly, there is an exception to the rule in question, in the case of certain *fictions* established * in [*490] pleading, for the convenience of justice. Thus, the declaration in ejectment always states a fictitious

(v) *Thomas v. Vandermoolen*, 2 Barn. & Ald. 197. *Bartley v. Godslake*, *ibid.* 199. *Shadwell v. Berthoud*, 5 Barn. & Ald. 750, 751. *Richley v. Proone*, 1 Barn. & Cress. 286. *Merrington v. Becket*, 2 Barn. & Cress. 81. *Bell v. Alexander*, 6 M. & S. 133. *Young v. Gadderer*, 1 Bing. 380. *Smith v. Backwell*, 4 Bing. 512. *Jones v. Studd*, *ibid.* 663. *Vere v. Carden*, 5 Bing. 413. *Smith v. Hardy*, 8 Bing. 435. *Miley v. Walls*, 1 Dowl. 648. *Bradbury v. Emanas*, 5 M. & W. 595. *Balmanno v. Thompson*, 6 Bing. N. C. 153; 8 Dowl. 76, S. C. *Horner v. Keppel*, 10 A. & E. 17. *Knowles v. Burward*, 10 A. & E. 19. *Blackburn v. Edwards*, 10 A. & E. 21. *Mitford v. Finden*, 8 M. & W. 511; 9 Dowl. 818, S. C.

demise, made by the real claimant to a fictitious plaintiff: and the declaration in trover uniformly alleges, though almost always contrary to the fact, that the defendant *found* the goods, in respect of which the action is brought.

*CONCLUSION.

[*491]

To the view that has been taken in this work, of the principles of the system of pleading, it may be useful to subjoin a few remarks on the merits of that system, considered in reference to its effects in the administration of justice.

When compared with other styles of proceeding, it has been shown (a) to possess this characteristic peculiarity — that it *produces an issue* ; that is, it obliges the parties so to plead, as to develop by the effect of their own allegations, some particular question as the subject for decision in the cause. With respect to the *degree* of particularity with which such question or issue is developed, we have seen in the first place, that it is always distinctly defined as consisting either of *fact* or *law*, because, in the former case it arises on a traverse, — in the latter it presents itself in the very different shape of a demurrer. But independently of this distinction it will be remembered, that the issue produced is *required to be *certain* or [*492] particular. (b) It is true, that some issues are framed with less certainty than others ; but still it is the universal property of all to define the question for decision, in a shape more or less specific.

(a) Vide *suprà*, * p. 136.

(b) Vide *suprà*, * p. 144.

That prior to the institution of any proceeding for the purpose of decision, the question to be decided should be by some means publicly adjusted as consisting either of fact or law, and this too with some certainty or specification of circumstance, is evidently required, by the nature of the English common law system of jurisprudence. For, by the general principles of that system, questions of law are determinable exclusively by the judges; while questions of fact (some few instances excepted), can be decided only by a jury; and in those excepted cases, are referred to other appropriate modes of trial. Unless therefore some public adjustment of the kind above described, took place between the parties, they would be unable, after the pleading had terminated, to pursue further their litigation. For they might disagree upon the very form of the proceeding, by which the decision was to be obtained; or, if they both took the same view of the general nature of the question, so [*493] that they both referred their *controversy to the same method of determination,—for example, trial by jury,—they might yet differ as to the shape of the question to be referred.

A public adjustment of the point for decision of the specific kind above described, being for this reason necessary, there are two ways in which it might conceivably be effected—either by a retrospective selection from the pleading, or by the mere operation of the pleading itself. The law of England, in producing an issue, pursues the latter method. For as has been shown, the alternate allegations are so managed, that by the natural result of that contention, the undisputed and immaterial matter is constantly thrown off, until the parties arrive at demurrer, or traverse;—upon

which a tender of issue takes place, on the one hand, and an acceptance of it on the other; and the question involved in the demurrer or traverse is thus mutually referred for decision.

The production of an issue, when thus defined and explained, appears to be attended with considerable advantage in the administration of justice—for the better comprehension of which it will be useful to advert to those styles of juridical proceeding, in which no issue is produced.

In almost every plan of judicature with which we are acquainted, except that of the common law * of England, the course of proceeding [* 494] is to make no public adjustment whatever of the precise question for decision. For as all matters, whether of law or fact, are decided by the judge, and by him alone, upon proofs adduced on either side by the parties, the necessity upon which that practice has been shown to be founded in the English common law system, does not arise. Consequently the mutual allegations are allowed to be made *at large* as it may be called;—that is, with no view to the exposition of the particular question in the cause, by the effect of the pleading itself. The litigants indeed, before they proceed to proof, must explore the particular subject in controversy, in order to ascertain whether any proof be required, and to guide them to the points to which their proof is to be directed. And upon the hearing of the cause, the judge must of course also ascertain for his own information, the precise point to be decided, and consider in what manner it is met by the evidence. But in these proceedings, neither the court nor the parties have any public exposition of the point in controversy to guide them; and they judge of it as a matter

of private discretion, upon retrospective examination of the pleadings. (*d*)

[*495] This, as already stated, is the almost universal method; but there is another, which also requires notice; viz. that which at present prevails in the Scottish judicature. Since the trial by jury in civil causes has been engrafted upon the juridical system of Scotland, it has, of course, been found necessary to adjust and settle publicly, between the parties, the particular question or questions on which the decision of the jury is to be taken. But instead of eliciting such question (called by analogy to the law of England, the issue,) by the mere effect and operation of the pleading itself, according to the practice of the English courts, the course taken has been to adjust and settle the issue *retrospectively* from the allegations, by an act of court; and these allegations have consequently continued to be taken *at large*, according to the definition of that term already given. (*e*)

[*496] * Now the English common law method, as compared with either of those that have been

(*d*) The practice of the courts of *equity* in this country forms no exception to this general statement. For, though the common replication offers a formal contradiction to the answer, — a contradiction which imitates in some measure the form of an issue in the common law, and borrows its name, yet in substantive effect, the two results are quite different; — for the contradiction to which the name of an issue is thus given in the equity pleading, is of the most general and indefinite kind, and develops no particular question as the subject for decision in the cause.

(*e*) It is to be understood, however, that the issues are not extracted from the pleadings in the full latitude of allegation sometimes allowed to them by the Scottish law; but from allegations of a more succinct and specific character, called *condescendences* and *answers*; which the parties are directed to give in, as the materials from which the court are to adjust the issue. Yet, even these *condescendences* and *answers* are pleadings *at large*, in the sense in which the author uses that term; for they do not develop the point in controversy by their intrinsic operation.

just described, possesses this advantage, that the undisputed or immaterial matter which every controversy more or less involves, is cleared away by the effect of the pleading itself ; and therefore, when the allegations are finished, the essential matter for decision necessarily appears. But under the rival plans of proceeding, by which the statements are allowed to be made at large, it becomes necessary, when the pleading is over, to analyse the whole mass of allegation, and to effect for the first time the separation of the undisputed and immaterial matter, in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders have been allowed to indulge ; but where the allegations have not been conducted upon the principle of coming to issue, or, in other words, have been made at large, it follows from that very quality, that their closeness and precision can never have been such as to preclude the exercise of any discretion in extracting from them the true question in controversy ; for this would amount to the production of an issue. Therefore, it will always be in some measure doubtful, or a point for consideration, to what extent, and in what exact sense, the allegations on one side are disputed on the other, and also to what extent the law relied upon * by [*497] one of the parties is controverted by his adversary. And this difficulty, while thus inherent in the mode of proceeding, will be often aggravated, and present itself in a more serious form, from the *natural tendency* of judicial statements, when made at large, to the faults of vagueness and prolixity. For where the pleaders state their cases, in order to present the materials from which the mind of the judge is afterwards to

inform itself of the point in controversy, they will of course be led to indulge in such amplification on either side, as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision. On the other hand, it is evident, that upon the English common law method, the pleaders, having no object but to produce the issue, are without the least inducement, either to an uncertain, or a too copious manner of statement; and, on the contrary, have a mutual interest to effect the result at which they aim, in the shortest and most direct manner.

The difficulty that must thus be always, in some measure, found under the method of pleading at large, in ascertaining the precise extent of the mutual admissions of fact or law, is attended with this obvious inconvenience — that a party may be led to proceed [*498] to proof or trial, upon matters not *disputed, or not considered as material to be disputed, on the other side, — or to omit the proof or trial of matters which are meant to be disputed, and which are in fact essential to the final determination of the cause. The judge may consequently find, upon examination of the whole process, and hearing the farther allegations and arguments of the parties, that the investigation of fact has either been redundant, and therefore attended with useless expense and delay; or defective, so as not to present him with the materials on which he can properly adjudicate. On the other hand, these evils are almost unknown to the English system of judicature.

On the whole, then, it may be fairly concluded, that our system of pleading is not only distinguished from other methods of judicial allegation, by its production

of an issue, but is in this respect *advantageously* distinguished from them, and derives from this singularity of proceeding, considerable protection from inconveniences under which they severely labour.

It also appears to deserve high praise, in respect of such of its rules as are classed in this work, by their tendency to prevent *obscurity*, or *confusion*, *prolixity*, or *delay*. (*f*) Here, indeed, the objects *pursued are not peculiar to the English sys- [*499] tem; for the avoidance of such faults is of course, in some measure, the aim of every enlightened plan of judicature. But, in general, there is either a want of regulation to enforce the object, or the regulation is found to be ineffectual. On the contrary, the system of pleading has various rules specifically designed to promote precision and brevity in the method of allegation, rules exclusively its own, and extremely strict and efficacious in their character. Accordingly, it has ever been proverbially famous for the former of these qualities; and in modern times, and under the influence of enlightened judges, the principle of avoiding the introduction of unnecessary matter (*g*) has been so rigorously applied, and the cases of unnecessary allegation have been so well defined and understood, (*h*) as considerably to remove its not less ancient and notorious *reproach* of amplification and prolixity.

While the system of pleading is thus in general distinguished for the excellence of its structure, it cannot be denied that there are points on which its merit is questionable.

(*f*) Suprà, * pp. 414–451.

(*g*) Vide suprà, * p. 467.

(*h*) This is by the effect of the rules tending to limit or restrain the degree of certainty in allegation. Vide suprà, * pp. 379–413.

The excessive subtlety and needless precision [*500] by *which some parts of it are characterised, often expose suitors to the necessity of expensive amendments, and sometimes occasion an absolute failure of justice upon points of mere form. Yet is their inconvenience less severely felt in practice at the present day, than a mere theoretical acquaintance with the subject would lead the student to suppose. Many of the intricacies and mysteries of pleading, — those for example which relate to *colour* and *special traverses* — long discouraged by the courts, are rapidly falling into disuse, and, on the whole, have but little effect in the actual operation of the system; and, with respect to the science in general, it may be remarked, that its increasing cultivation continually improves the course of practice, and renders the occasions for formal objection less frequent.

Such are the principal observations which a long practical acquaintance with pleading has suggested to the author, on the merits of that celebrated system of allegation. Founded as they are on experience, he does not hesitate to offer them to the public, though the limits which he has prescribed to himself, in this part of the work, have obliged him to condense them into a form more summary than befits the interest, the importance, and the difficulty of the subject.

*NOTES.

[*i]

NOTE 1. See * p. 2.

Plée in French, in English *plea*, were anciently used to signify *suit* or *action*. While used in this sense, they gave rise respectively to the words *pléder* and *to plead*; of which the primary meaning was accordingly to *litigate*; but which in the later English law have been taken in the more limited sense of *making allegation in a cause*. Hence the name of that science of *pleading*, to which this work relates.

This variable word *to plead* has indeed still another and more popular use, importing the forensic *argument* in a cause; but it is not so employed by the profession.

Whether *plée* and *pléder* were *derived* from the parallel Latin terms *placitum* and *placitare* is somewhat doubtful. (a) If so, it must have been through the gradation of the more ancient French word *plaid*s, which, according to Houard, (b) at first signified the assemblies of the kings and great men of the realm; and was afterwards applied * to ordinary courts of justice. [*ii] With respect to *placitum* itself, it is most probably of Roman origin, for it is clear that both the rescripts of the emperors and the judicial decisions in the Roman empire had that name. (c) It has, however, been considered by some writers as derived from *plats*, (a German word for *campus*), *quod in campo tenerentur placita*. (d) Either of these, though a less amusing, is perhaps a

(a) Spelman considers the word *plea* as of Saxon origin. (See Spelm. Gloss.) But the almost universal derivation of our juridical terms from the language of the Normans, would seem to render this exception an improbable one.

(b) *Anciennes Loix des François, &c. sect. 10.*

(c) See *Brisson de Verborum signif.*

(d) *Ducange, Gloss. verbo Placitum.*

more satisfactory conjecture, than that which derives *placitum* from *placendo* — quia bene placitare super omnia placet. (e)

NOTE 2. See * p. 9.

This part of our ancient judicial system, viz. the use of *original writs*, as essential formulæ for the institution of a suit, is not only connected with the whole scheme of actions, but will appear, in the course of this work (see * p. 471), to have an important relation to pleading in particular. It is also remarkable as being (in modern times at least) unknown to the practice of the courts of other countries, and a peculiarity of the national law. These circumstances naturally excite some curiosity to investigate its origin; yet the subject is involved in considerable obscurity. Though we know that some of the *brevia* are at least as ancient as the time of Henry II. (being found in the work of Glanville, who wrote in that king's reign), the student will in vain search the books of the science for any distinct and satisfactory account of their original invention. It is said, on high authority, that the more common

and ordinary writs were “de communi consilio totius [* iii] regni concessa et approbata;” (f) and also that *some writs existed “long before the Conquest;” (g) while another learned writer asserts, that the more ancient of them were brought from Normandy; (h) and these vague and somewhat inconsistent statements seem to constitute the whole substance of the information to be derived from professional sources on this subject. If we turn for further elucidation to the antiquarians, we shall find little beyond vague conjecture; and even in this, a great discordance, both as to the origin of the instrument, and the derivation of its name. While one learned writer refers the origin of the term *breve*, to a new application among the Normans of a word derived from their Scandinavian ancestors, signifying a letter or epistle; (i) others speak of it as borrowed from the imperial and pontifical constitutions, and as ultimately derived from the word *brevis*. (k)

(e) Co. Litt. 17 a.

(f) Bract. 413 b.

(g) Co. Pref. to 10 Rep. This proposition of Lord Coke's seems to have been satisfactorily refuted by Hickes. See the *Dissertatio Epistolaris* in his *Thesaurus*.

(h) Gilb. Hist. of C. P. 2, 5.

(i) Hickes, *Thes. Diss. Epist. in notis*, p. 3.

(k) Spelm. Gloss. tit. *Breve*; Cragii *Jus Feud. lib. ii. D. 17, 23, 25*; Selden's notes on Hengham.

Again, the language of these instruments is supposed, on great authority, (*l*) to have owed much to the Roman forms; though, on the other hand, an illustrious antiquarian declares, that it has the most remote English extraction, and has hardly a word derived from the Cæsarean law. (*m*)

Whatever may be the authority for the opinion, that *brevia*, for the institution of suits, were in existence in this country before the Conquest, it is at least certain that there is no mention of them in the laws of the Anglo-Saxons now * extant; (*n*) [*iv] but that they were in use, both in substance and in name, in the ancient laws of *Normandy*, is a fact well known to all who have looked into the *Grand Coustumier*. On this, however, as on the many other features common to the laws of England and *Normandy*, the doubt has been, to which of the two nations the original invention is to be ascribed; for it seems to be clear, that if the English at first received the institutions of their conquerors, they in turn began to impart their own improvements; and the *Grand Coustumier* is confessedly of date long posterior to the treatise of *Glanville*. (*o*) The remark of a learned foreigner not only tends to decide this question, but at the same time throws more light on the ulterior origin of the *brevia*, than can be obtained from any writer of our own country. It is well known that the use of forensic formulæ, obtained among the semi-barbarous tribes who governed Europe during the middle ages, at least among the French and Lombards — nations both distinguished among their neighbours by the superior refinement of their jurisprudence. (*p*) The author in question, who speaks of the *Brevia* of *Glanville*, as *Brefs Anglo-Normands*, from their equal adoption in both countries, points out their similarity to certain forms preserved by *Marculphus*, and which, under the different names of *præceptiones* and *indiculi*, were used among the Franks during the two first races of the monarchy. (*q*) The resemblance in their general conception will be found strong enough to lead, with great probability, to the inference, that the English *brevia* were derived through *Normandy* from a Francic source — an * inference con- [*v]

(*l*) Barrington on the Ancient Statutes, c. 88, 90.

(*m*) Seld. Diss. ad Fletam, c. 9, s. 1.

(*n*) Hickee, Thes. Diss. Epist. p. 3.

(*o*) See Hale's Hist. of Common Law, c. vi.

(*p*) J. G. Heinec. Elem. Germ. lib. iii. tit. ii. sect. lxxxii., lxxxiii.

(*q*) Houard, Anc. Loix des Franc. &c. vol. ii. pp. 9-16.

firmed by the fact elsewhere stated by the same author, that at this early period the judicial usages of Normandy were in the main the same with those of France at large. (r) The reader may judge of the degree of similarity between the *Brevia* of Glanville and the *Præceptiones* of the Franks, by comparing the following formulary from Marculphus, with the English *writ of right*. "Ille Rex, vir inluster, illo comiti. Fidelis Deo propitio, noster ille, ad præsentiam nostram veniens, clementiæ regni nostri suggessit eo quod pagensis vester ille, eidem, terram suam in loco nuncupante illo, per fortiam tulisset, et post se retineat injuste, et nullam justitiam ex hoc, apud ipsum, consequi possit; Propterea ordinationem presentem ad vos direximus, per quam omnino jubemus, ut ipso illo taliter constringatis, qualiter, si ita agitur, hanc causam contra jam dicto illo, legibus studeat emendare. Certe si noluerit, et ante vos recte non finitur, memorato illo, tultis fide jussoribus, Kalendas illas, ad nostram eum omnimodis dirigere faciatis præsentiam." (s)

The following will be found to have a close affinity with the Anglo-Norman writ of *trespass for an assault*.

"Ille Rex, vir inluster, illi. Fidelis noster ille ad præsentiam nostram veniens, nobis suggessit quod vos eum, nulla manente causa, in via *adsalissetis*, et graviter livorassetis, et rauba sua in solidos tantos, eidem tulissetis, vel post vos retineatis indebite, et nullam justitiam ex hoc, apud vos, consequere possit. [*vi] Propterea, præsentem *indiculum advos direximus, per quem omnino jubemus ut si taliter agitur, de præsentem hoc contra jam dicto illo, legibus studeatis emendare. Certe si nolueritis, et aliquid contra hochabueritis quod opponere, non aliter fiat nisi vosmet ipsi per hunc indiculum commoniti, Kalendas illas proximas, ad nostram veniatis præsentiam, eidem ob hoc, integrum et legale dare responsum." (t)

The opinion that the English *Brevia* are of French extraction, is not peculiar to Houard. It is held, as has been already observed, by L. C. B. Gilbert; and a writer on the feudal law, the learned

(r) Houard, Dict. Analytique, &c. verbo Droit.

(s) Marculphi Formularum, lib. i. 28. The reader, who wishes to compare with this the Anglo-Norman formula in the original Latin, will find it in Glanville, lib. i. c. 6. And it may be remarked, that it has a decided advantage over the French model, in point of Latinity; the latter being indeed in such a barbarous dialect as to be scarcely intelligible.

(t) Marcul Form. lib. i. 29.

Craig, observes of them, *Usum in Gallia, antiquissimum puto; in Normannia adhuc in usu sunt. Gulielmus Conquæstor cum armis, etiam leges Normannicas Angliæ intulit; inde factum, ut omnes fere causæ in Anglia, adhuc per Brevia deducantur.* (u)

To attempt to trace them further may appear superfluous, yet it may be observed, that one of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint or claim; a method devised in a view, probably, to the more certain definition of the nature of those injuries for which the law afforded redress, and perhaps, also, to save the trouble of inventing new modes of expression for each particular case of wrong as it might arise. Whatever the object, it is certain that such was the practice of ancient Rome, and *that* from a period almost as early as the introduction of the laws of the twelve tables; (x) and so severely were these formulæ observed, that any deviation from them was fatal to the **cause.* (y) This strictness evidently tended to injustice; and we accordingly find that it was banished from the Roman law, by Constantine, who abolished the judicial formulæ. (z) Yet form was not altogether extirpated. Certain general distributions of the subjects of litigation were recognised under the title of *actions*; (a) and considerable attention continued to be paid to the frame and wording of the complaint. (b) When, therefore, we find the rude judicature of the nations who were in possession of Europe at the fall of the Roman empire, exhibiting, at a very remote period, the same contrivance of fixed judicial formulæ, we are naturally led to refer it to an imitation either of the ancient or more modern system of their predecessors. Yet whether it were the result of such adoption, or the fruit of original invention, it is certainly not easy, nor perhaps very important, to decide.

(u) Crag. Jus. Feud. lib. ii. D. 17, 23, 25.

(x) Dig. lib. i. tit. 2; Cic. pro. Rosc. Com. c. 8, &c.

(y) Quinctil. lib. vii. c. 3; Brisson de Formul. lib. v. xl.

(z) Brisson, *ibid.* lib. v. xl. liii.; Voet. ad Pandect. lib. ii. tit. xiii s. 9.

(a) Inst. lib. 4, tit. 6; Car. Sigon. de Judiciis.

(b) Vide Inst. and Voet. ubi supra.

NOTE 3. See * p. 9.

Ejectment has been latterly often ranked as a *mixed* action ; (c) because the plaintiff has judgment for specific recovery of the term itself, as well as nominal damages for the ejection. And the framers of the late statute 3 & 4 Will. IV. c. 27, have followed and fixed that classification. With deference, however, it is conceived that the class of an action depends not on the form of judgment, but on the form of writ and declaration ; and that the question is, not whether specific recovery be *adjudged*, but whether it [* viii] be * *claimed* in the form of the proceeding. (See the definition of real and mixed actions, *suprà*, * p. 3.) Now it is clear, that, in the form of writ and declaration, an ejectment is no more than a species of the action of trespass, and as such it has been most anciently considered. Ejectione firmæ n'est que un action de trespass en son nature, &c. Fitz. Abr. tit. Eject. firm. 2, cited 3 Bl. Com. 200.

NOTE 4. See * p. 20.

Until the passing of the statute 2 Will. IV. c. 39 (commonly called the Act for Uniformity of Process,) which established a simple and uniform course of proceeding for the commencement of personal actions, the three superior courts at Westminster differed greatly from each other in their modes of process in actions of this description ; and even the same court admitted a considerable variety of methods according to the circumstances of the case. The improvements introduced by this statute were founded on the Report of the Common Law Commissioners, some extracts from which shall here be given as explanatory of the former state of the law on this subject, and the grounds on which it was altered.

“ The varieties as to process in personal actions may be summed up thus : — In each of the courts the proceeding against attorneys and officers, — in the King's Bench and Exchequer, that against prisoners also, — is by bill without process ; and in other cases, their processes, or modes of commencing the suit, are as follows : —

(c) Vide 3 Bl. Com. 199. Doe d. Kingston v. Kingston, 1 Dowl. N. S. 263.

NOTES.

* x

* *In the King's Bench.*

[* ix]

By Original : —

Original writ adapted to the Action.

By Bill : —

- | | |
|--------------------------------------|--|
| 1. Attachment of Privilege | $\left\{ \begin{array}{l} 1. \text{ With ac etiam or} \\ \text{bailable.} \\ 2. \text{ Not bailable.} \end{array} \right.$ |
| 2. Bill of Middlesex | |
| 3. Latitat | $\left\{ \begin{array}{l} 1. \text{ Bailable.} \\ 2. \text{ Not bailable.} \end{array} \right.$ |
| 4. Bill and Summons. | |

In the Common Pleas.

By Original : —

1. Original Writ adapted to the Action.

2. Original Writ quare clausum fregit.

- | | |
|----------------------------|---|
| 3. Common Capias | $\left\{ \begin{array}{l} 1. \text{ Bailable.} \\ 2. \text{ Not bailable.} \end{array} \right.$ |
| | |

By Bill : —

1. Attachment of Privilege.

2. Bill and Summons.

In the Exchequer.

1. Venire ad Respondendum.
2. Subpœna ad Respondendum.
3. Quo Minus Capias.
4. Venire of Privilege.
5. Capias of Privilege.
6. Bill and Summons."

The Commissioners then proceed as follows :

* " Having thus shown that there is an inconvenient [* x]
and unnecessary variety in the several primary writs of
process in personal actions, and that each of them, individually
considered, is also open to considerable objection, we beg leave to
recommend, as the first and most obvious amendment in this
branch of the law, that as the object of all these writs is either
simply to enforce the defendant's appearance, or to enforce it in
such manner, as to obtain security at the same time for ultimate

execution on his person in satisfaction of the debt, so the primary forms of process should be reduced to two, viz., *summons* and *capias*, the first to be used where the plaintiff intends merely to compel appearance, the latter where (being entitled to proceed by way of arrest) he has it in view also to secure the defendant's person.

“In the event of its being found expedient to retain the use of real actions, (a subject which belongs to a subsequent period of our inquiry,) there seems to be no reason why the suggestion here made should not extend to these as well as to personal suits; for a writ of summons would in its nature be well adapted to every case of action real. Whether ejectment and replevin should follow the same rule, or be allowed to form exceptions (as at present) to the ordinary course, is a question which it is not easy to decide till the time shall arrive when these actions shall come specifically into discussion. In the mean time, however, we incline to the opinion that ejectment might more advantageously commence, like other suits, by summons; and that the bond taken by the sheriff in replevin should be conditioned for prosecuting the suit directly in one of the Courts at Westminster by an ordinary summons, instead of filing a plaint in the first instance in the county court. Much certainly would be gained in both cases, in point of simplicity and uniformity, * by the change; and in replevin it would also be attended with a considerable saving of expense. But whether these particular actions should be accepted or not, we have no doubt that in other cases, whatever be the court, the cause of action, or the quality of the plaintiff or defendant, it would be practicable and highly expedient that the mode of commencing a personal suit should uniformly be by summons or *capias*, adapted with slight differences to the nature of the particular demand or complaint; and that all other methods of instituting suits (including the filing of bills without process) should at once be abolished. The summons and *capias* should not be framed upon the model of any of the existing writs, these (as already shown) being both expensive and inconvenient in their construction, but they should be adapted with the utmost brevity and simplicity to the purposes in view; and no fees should be paid upon them either to the attorney employed, or to the officers of the court, beyond what may form a fair compensation for the trouble and expense actually incurred in their preparation.” — *First Common Law Report*, p. 74.

NOTE 5. See * p. 23.

That the appearance was actual in the time of Hen. II. seems sufficiently proved by the following passages in Glanville: *Utroque litigantium, apparente in curia, petens ipse loquelam suam et clameum ostendat, in hunc modum — Peto versus istum H., &c. Auditâ vero loquelâ et clameo petentis, in electione ipsius tenentis erit, se versus petentem defendere per duellum, &c. (e)* *Utroque præsente in curia, is qui petit, jus suum in hæc verba*

** versus adversarium suum proponat, Peto, &c. Audito* [* xii] *autem clameo, &c. (f)* The forms of expression which occur in Bracton, in the time of Hen. III., everywhere lead to the same conclusion. For example, *comparentibus* tam petente quam tenente, petens actionem qua agere velit, et intentionem suam, proponere debet *coram justitiariis, &c.* Et *audito* Brevi de Recto, *dicat sic petens vel ejus advocatus* in præsentia Justitiariorum pro tribunali residentium. Hoc ostendit vobis A., &c. (g).

It is said that it was the statute of Westminster 2, (13 Ed. I. c. 10), which first gave the general liberty to all persons of suing and defending by *attorney*; and that, before that statute, a special warrant from the crown, for that purpose, was required. (h) It seems, however, that this is only to be understood of *appearance* by attorney, and not to the conduct of the suit by attorney *after appearance once made*. For it is clear that long prior to the 13 Ed. I., and even in the time of Glanville, a party might, upon appearance first made by himself in person, appoint a *responsalis* (whose office, though in some respects different, was in substance the same with that of an attorney) to represent him during the subsequent progress of the cause, "ad lucrandum vel perdendum pro eo." (i) And it is not said by Glanville that this required a warrant from the crown. (k)

(e) Glan. lib. ii. c. 3.

(f) Ibid. lib. iv. c. 6.

(g) Bract. 372 b; and see 10 E. III. 19, pl. 21.

(h) 1 Tidd, 54, 8th edit.; Gilb. C. P. 32, 33; 2 Reeves, 169. Per Bayley, J., in *Johnson v. Birley*, 5 Barn. & Ald. 542.

(i) Glan. lib. xi. c. 1.

(k) See *Beecher's case*, 3 Rep. 58 b. acc.

[* xiii]

* NOTE 6. See * p. 23.

For proof that in the time of Hen. II. and Hen. III. the pleading was *oral*, it will be sufficient to refer to the passages cited from Glanville and Bracton in the last note; and to observe, that not the least allusion is made, in either author, to the use of written pleadings, the introduction of which is generally supposed not to have taken place till the middle of the reign of Ed. III. (l)

NOTE 7. See * p. 23.

As to the practice of oral pleading among the *Lombards*, see Muratori, in a note to his edition of the *leges Langobardicæ*, (m) where he says that the pleadings among that nation appear to have been *non scripto judici tradita, sed petitione verbali pronunciata coram iudicibus*. As to the *German tribes in general* (comprising the *Franks*), see the *Elementa Juris Germanici* (n) of Heineccius, who says, *formulas non scriptas offerebant, sed vivâ voce præcinebant*.

NOTE 8. See * p. 14.

The use of professional *pleaders* or *advocates* may be traced among some of the continental nations to a period extremely remote. The Lombards had the following law: *Si forsitan aliquis per simplicitatem suam causam agere nescit, veniat ad placitum, et si Rex aut Judex præviderit quod veritas sit, tunc debeat dare ei hominem qui causam ipsius agat.* (o)

[* xiv] * In the *Francic Formulæ* apud Lindenbrog., contained in the *Capitularies* by Baluzius, there is a record of a cause between a bishop and a private individual, where the bishop pleads by his *advocate*, and the other in his own person.

In the *Assises de Jerusalem*, one of the most curious and important relics of the jurisprudence of the middle age, and fully recognised as an authentic compilation from the laws of France, made towards the close of the eleventh century, (p) we have a full

(l) 3 Reeves, 95.

(m) Murat. Script. Rer. Ital. vol. i.

(n) Lib. iii. tit. iv. sect. clvi.

(o) *Leges Langobard.* apud Lindenbrog. 650.(p) Ouvrage précieux, says Mably (in his *Observations sur l'Histoire*

account of the office, duties, and proper qualifications of a *pleuder*. — Doit chascun de ceaus qui veont pleideer en la haute court, demander *conseill* au seignor, avant que il comance a pleideer. Il doit demander au seignor, a conseil, le meillour pleideoir de la court a son escient, se il est pleideoir ou se il ne l'est; pour ce que se il ne est pleideoir, que son conseil li sache sa raison garder et sa querele desreigner de ce dont il est requeroir, et deffendre de ce dont il est deffendoir; et se il est pleideoir, pour ce que il ait plus de conseil; qu'il n'est nul si sage pleideoir, qui ne puisse bien souvent estre averti el plait de ce qui bon li est, par un autre pleideoir o lui; que deus pleideoirs savent plus que un, &c. ch. ix. . . . Qui a conseil et se veaut clamer d'ome ou de feme qui est present en la court, il doit faire dire par son conseil, au seignor, si que celui de qui il se clame ou veaut clamer, l'oye, Sire tel se clame a vous de tel chose, et en veaut avoir droit par vous et par la court; et le nome, et die de quoi il se clame, et as plus briefves paroles qui il pora, face son clame, &c. ch. xxvii. Il convient a celui que est bon pleideoir et soutill, que il soit sage de son * naturel, et que il ait esprit sein, et soutill engin, [* xv] et que il ne soit doutif, ne esbay, ne hontous, ne hatif, ne non chaillant el plait, ne que il ait s'entente ne sa pensée aillors tant com il pleidoie, et que il se garde de se trop corroucer ne agrier ne ehmourir en pleidoiant, ch. xxiv. As a translation of this barbarous dialect may save the reader some trouble, the following very literal one is offered. — "Every person about to plead in the supreme court, ought, before he begins, to pray the lord to appoint him counsel. He ought to pray, for his counsel, the best pleader in the court; and this, whether he is himself a pleader, or not; because, in the latter case, he will need counsel to defend his right, and establish his claim or defence; and even in the former, he will do well to have counsel; since there is no pleader so wise, that he may not be often advised, on his pleading, by another pleader; as two pleaders know more than one, &c. He who has counsel, and wishes to make claim on some man or woman present in court, ought to say by his counsel to the lord, so that the other party may hear, — Sir, such an one makes, before you, such a claim, — and hopes to obtain justice, in that behalf, from you and the court; — and then he should say what he claims, and in the

de France, vol. ii. p. 346), et très propre à nous donner des lumières sur l'époque de l'origine de nos différentes coutumes.

shortest way possible, &c. — A good pleader ought to have good sense, a sound understanding, and a subtle genius; he should be free from the faults of indecision, timidity, false shame, haste, and nonchalance; while he pleads, he should keep his attention from wandering to any other subject, and should also take care to avoid undue heat and asperity." Some of these admonitions seem to deserve the attention of the nineteenth, no less than the eleventh century.

The use of advocates was not confined to the Franks [* xvi] and Lombards. It obtained at the same period among * the continental nations in general. Heinccius speaks of them as generally allowed throughout the German tribes, though under permission to be previously obtained from the judge, — which, as he incidentally observes, explains the modern practice, of not allowing all persons indiscriminately to plead causes, but confining the privilege to a certain number appointed by authority. (q) With respect to the Franks, in particular, he says, in foro litigantibus eo magis opus erat jurisperitorum auxilio, quo pluribus formularum ac sollemnitatum tricis, implicata erat eorum jurisprudentia; et quo facilius in his verbis labi possunt homines plebei, et aliis distracti negotiis. (r) He makes a similar remark as to the Lombards: — Quum enim et hæc gens paullo plus tribueret juri subtiliori et formulario, homines plebei et harum rerum imperiti vix poterant advocatorum jurisperitorum opera carere. (s)

Hachenberg also lays it down as a general feature in the judicial system of the Germans of the middle ages: — Aderant in judicio *advocati* — quos Clamatores et Ferendarios priscae leges vocant — qui causas litigantium nuda simplici oratione, sine ullo verborum circuitu, tractare jubebantur. (t)

In England, though the particular degree and denomination of *barrister* is supposed by Blackstone (1 Bl. Com. 23) not to be more ancient than 20 Ed. I., yet it appears that there were persons learned in the law, and skilful in pleading causes, at least as early as the reign of William Rufus; (u) and Bracton makes [* xvii] express mention of *counsel* * *pleaders*, and *advocates*, in the reign of Henry III. (x) And not only were such pro-

(q) Elem. Jur. Germ. lib. iii. tit. ii. sect. xcix.

(r) Elem. Jur. Germ. lib. iii. tit. ii. sect. lxxxii.

(s) Ibid. sect. lxxxiii.

(u) 1 Reeves, 228.

(t) Hach. Germ. Media, p. 97.

(x) Bract. 412 a., 372 b.

fessional persons employed, but (as stated in the text) the rule seems to have been already established, which excludes all but regular advocates from pleading in causes in which they are not personally concerned. This point appears to be sufficiently proved, even by the following extract from the *Placitorum Abbreviatio*, a compilation published a few years since, from our earliest judicial records: — Abell. de Sancto Martino venit et narravit pro Episcopo. *Et non fuit Advocatus. Ideo in misericordia. Custodiatur.* (y) And additional evidence of the same proposition is supplied by the following curious passage in the *Vitæ viginti trium Sancti Albani Abbatum*, by the historian Matthew Paris, written about the same period with the preceding extract. After complaining of certain oppressions which the abbey had sustained from a person protected and encouraged by John Mansel, the historian proceeds: — Nec quicquam juris vel ultionis assistente memorato Johanne Regis lateribus et conciliis, potuimus obtinere. Quinimo, metus et persuasio ipsius Johannis, omnium Justiciarium et placitantium Advocatorum (quos Banci narratores vulgariter appellamus) ora penitus obturavit. Ita ut multo totiens oportuit Dominum Willielmum tunc cellarium (virum scilicet circumspectum et facundum) suum sermonem et querelam in persona propriâ coram Justiciariis, imo etiam coram Rege et Barnagio proponere. Et protestati sunt Justiciarii, secretius in aure dicti Domini Willielmi instillantes, — quod duo tunc temporis in regno dominabantur, scilicet Comes Richardus, et Johannes Mausel — contra quos non audebant sententiare. (z)

* NOTE 9. See * p. 24.

[* xviii]

All the authorities prove that questions of law have at all times been the exclusive province of the judges. Thus, in the *Placitorum Abbreviatio* there is an entry, in the 6th year of Richard I., that *sub iudicibus* lis et contentio fuit, utrum carta prædicta debet teneri versus puerum qui infra ætatem. (a)

And again, in the fourth year of king John, the jury upon an inquisition, declare — non pertinet ad eos de jure discernere. (b)

(y) Plac. Ab. 137; Kane. rot. 22, temp. 32 Hen. III.

(z) Matt. Par. Hist. p. 1077.

(a) Plac. Ab. 5 War'. temp. 6 Ric. I.

(b) Plac. Ab. 40 Linc.' temp. 4 Johan.

NOTE 10. See * p. 25.

This phrase *of issue* occurs at the very commencement of the Year-books, viz. : 1 Ed. II. ; but the author has not traced it to an earlier period. In some instances the expression *isser d'empler* occurs, which may be translated *to get out of, or finish the pleading* ; and clearly marks the meaning and derivation of the term *issue*.

In the reign of Edward IV. we find the Latin term thus regularly defined : — *Exitus idem est quod finis, sive determinatio placiti*. — Year-book, 21 Ed. IV. 35.

It is observable that the parallel word *fin* appears to have been used in the same sense in *Normandy*. See *Commentaires de Terrien*, lib. ix. c. xxvii.

The terms *issue en ley* and *issue en fet* occur as early as the third year of Ed. II. See the Year-book, 3 Ed. II. 59.

[* xix]

* NOTE 11. See * p. 26.

Lord Coke defines a record as a “ memorial or remembrance in rolls of parchment, of the proceedings or acts of a court of justice,” &c. : and observes, that “ the rolls, being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity as they admit no averment, plea, or proof to the contrary.” Co. Litt. 260 a. The origin of the practice of *recording* (another peculiarity of the English law), appears to have eluded our legal antiquarians as much as that of the *Brevia* (vide sup. NOTE 2), but it is no doubt referable to the same source. The term *record* is itself, in its immediate derivation, French ; and the law of records is copiously discussed under that name in the *Grand Coustumier*, the most ancient depository of the Norman customs. The manner in which it is there treated might alone be sufficient to show that France was its native soil ; and that it had not been adopted from the English courts ; not only because no allusion is there made to any recent introduction of the practice, — but because the practice appears in the Norman courts, in a shape obviously more consonant with the original meaning and derivation of the term than that which it bears in England. For it appears that in the Norman law, *recorder* anciently signified, *to recite or testify on recollection*, as occasion might require, what had previously passed in court ; and that this was the duty of the

judges and other principal persons who presided at the Placitum — thence called *recordeurs*. On the other hand, we find faint vestiges only of this the proper and ancient meaning, existing in England. Of these vestiges, one example occurs in our phrase of *recorder*, as applied to a borough judge; which is plainly a derivative or *secondary application of the Norman word [*xx] *recordeur*; and another, that may be mentioned, is the principle anciently recognised, *that the record is properly not in the parchment, but in the breast of the judge*. Thus, we find it said in the Year-book, 7 Hen. VI. p. 29. — *Le Record est tout temps en les cœurs de Justices, et le Roll n'est forsque remembrance pur le melior suerty*. But what decisively removes all doubt, as to the national character of this judicial practice is, that while no trace of it is to be discovered among the Anglo-Saxons (for their loose historical notices now extant, of some few important controversies, are evidently of a quite different kind), (c) it existed in the law of France at large, at least as early as at the Norman conquest, and in a shape exactly similar to that which it bore in Normandy. It is one of the directions given to litigants in the Assises de Jerusalem (compiled as early as 1099, and presumably referring to a state of law some time established), that they should collect as many of their own friends as possible, in court, and request them to be attentive to what is said, with a view of enabling themselves to retain and *record* it properly at the time of judgment or trial. *Qui veaut tost son plait atteindre, il doit faire estre en la court, tant de ses amis com il pora, et prier les, que il soient ententis as paroles qui seront dites as plais, et bien entendre et retenir, — si que il sachent bien le recorder, as esgars et as connoissances, se mestier li est*. (d) It is also recommended, that if there should * be [*xxi] an adjournment of the proceedings, and a further day appointed for the hearing of the parties, both the plaintiff and defendant should take care to *put down in writing* the nature of the claim that has been made, the day and place of the adjournment, and the names of those who were present at the first hearing: — and

(c) See the *Apographum Saxonicum*, published by Hickee (Thes. Diss. Epist. p. 2), and the observations on that instrument by Hallam, vol. ii. p. 141. — See also the plea in the county court between Gundulf and Pichot (Hickee, Thes. Diss. Epist. 33), and the plea of Pinenden, in the county court, in the reign of Will. I., mentioned by Lord Coke (preface to 9 Rep.); — the narratives of which are all in the same style.

(d) Assises de Jerusalem, xlv.

the plaintiff is advised to rehearse this writing before the adjournment day, to such of those persons as he considered most friendly to himself, in order to refresh their memories, and enable them to testify (*recorder*) at that adjourned meeting, if it should be necessary, both the day and place of the adjournment, and the words in which the claim or other allegations were first made: it being assigned as a reason for this particularity, that a variance from the claim first made would entitle the defendant to a new enlargement of the time for answering. (e) It is easy to conceive, though not to trace, the progress by which the occasional memorandum thus drawn up by the Francic pleader to confirm the recollection of his judges, took the shape of an official contemporaneous minute of the proceedings: and — no longer merely subordinate to a record or judicial report — became itself invested with that name and character. Whether this change had fully taken place at the date of Glanville's treatise (in the reign of Hen. II.,) that work does not enable us accurately to decide. He speaks, indeed, frequently of records, and lays down the maxim, that the curia regis, and no other court, was properly and generally a court of record; (f) but it is not clear, whether the written memorial, though already designated as the record and officially prepared, was made [* xxii] * contemporaneously with the proceedings themselves, or considered as intrinsic evidence of them, or in any other light than as an aid to the memory of judicial reporters. However, we find that at least very shortly *after* this period, the practice of recording, in the present sense of the term, was in full operation. The series of records now extant begins with the reign of Ric. I. (g) Curious extracts from some of the earliest of them have been printed, and are to be seen in the *Placitorum Abbreviatio*.

The following passage, in an able publication, confirms the account that the author has above given of the origin and true meaning of *recording*. In reference to the laws of the Scandinavians, it is observed — “No record or register authenticated the judgment of the court; which was preserved only by the recollection and knowledge of the judges who pronounced the decree, or of the assembled people who ratified the sentence. This usage of

(e) *Assises de Jerusalem*, xlix.

(f) *Sciendum quod nulla curia recordum habet generaliter præter curiam domini regis*. *Glan. lib. viii. c. ix.*

(g) See the Report of the Commissioners on Public Records, and 1 Reeves' *Hist. Eng. Law*, 218.

oral pleadings, and of proving legal proceedings by oral testimony, might be thought to be inconsistent with the assumption of the antiquity of written laws in Scandinavia, did we not know that the same practice was adopted by other systems of jurisprudence which are more familiar to us — such as the Customal of Normandy and the assises of the kingdom of Jerusalem. In Normandy a judgment pronounced by the king, sitting as Duke of Normandy, was *recorded* by his testimony added to that of one witness; or the royal judge might substitute three other witnesses in his stead: seven witnesses were required for the *record* of the Exchequer of the Assize. In these proofs it is clear that * the [* xxiii] compilers of the Customal did not contemplate the production of any written document, as evidence of past decrees or proceedings. The recorders swore as to what they had heard, and what had been said," &c. — *Edinburgh Review for August, 1820.*

NOTE 12. See * p. 29.

Besides these changes in the practical method of conducting the pleadings, it may be proper to notice the alterations that have taken place in the *tongue* or *language* used.

It has been the general opinion (*h*) that among the badges of servitude imposed by the Conqueror was the introduction of the French language, by his command, into the courts of justice; but an ingenious and learned writer (*i*) has controverted this notion with great plausibility, and even doubts whether that language were used in the courts till a much later period. That the French was not introduced *by command*, his arguments render extremely probable; but, on the other hand, when the history of the Conquest is recollected, there are many obvious reasons for supposing that the curia regis, or superior court of justice, (which was itself of Norman introduction) (*k*) would follow in its pleadings the language of the conquerors; and the considerations adduced by this author are not sufficient to outweigh the probability of that supposition.

It is however clear beyond dispute, that whatever was the most ancient language of the *pleading*, the *record* was, * from the earliest period to which that kind of document [* xxiv] can be traced, in the *Latin* language. For this it is sufficient to refer to the still extant series of records from whence

(*h*) 2 Reeves, 449; 4 Bla. Com. 416.

(*i*) See Law Tracts by Mr. Luders.

(*k*) 1 Reeves, 46.

the *Placitorum Abbreviatio* is extracted, though Blackstone seems to have fallen into an error on this subject, and to have supposed that the enrolment in Latin begun with the statute 36 Edw. III. c. 15, and in pursuance of its provisions. (*l*)

It is clear too that the *pleading* was in *French*, if not from the Conquest, at latest from the time of John or Edward I., (*m*) and so remained till by the stat. 36 Edw. III. st. 1, c. 15, it was enacted, that thenceforth the pleading should be no longer in French, but in English, and should continue to be enrolled or recorded in Latin. Afterwards, on the introduction of paper pleadings, they followed in the *language* as well as in other respects the style of the record, and were therefore drawn up in Latin. This continued to be the practice till a period so late as 4 Geo. II. c. 26, when it was provided, *that both the pleadings and the record should thenceforward be framed in English*: and it is in this language that they have since been drawn; the ancient terms of art and forms of expression, which had been so long known exclusively in a French and Latin dress, being now literally translated into English, but with that exception, remaining undisturbed.

NOTE 13. See * p. 30.

The practice of framing the allegations in the cause, according to technical rule and method, or in other words, [* xxv] * the science of pleading, — was no doubt derived from the same system of jurisprudence with the writ itself, viz. from that of Normandy. Vide *suprà*, NOTE 2. It is certain, at least, that the use of stated forms of pleading is not to be traced among the Anglo-Saxons; and the general account given by the learned Hickeys of *their* manner of litigation is as follows: — *Quisque causam suam sine solennioribus juris formulis, vel ipse agebat, vel causidicum et patronum sibi adscivit; quem amicitia, quem propinquitas, quem charitas, aut benevolentia — vel denique quem sors ipsa, nonnunquam — obtulerit.* (*n*) And the specimen he gives of the proceedings in a county court in the time of Canute, (*o*) strongly corroborates the opinion that they were strangers to any regular or artificial forms of statement. On the other hand it appears, that such forms were known among that great family of continental tribes, of which

(*l*) See 3 Bla. Com. 318, 319.

(*m*) Luders, ubi *suprà*.

(*n*) Hickeys, *Thes. Diss. Epist. p. 2.*

(*o*) *Ibid. p. 2.*

the Franks stood foremost in forensic refinement. Actor breviter proponebat actionem, simili fere formulâ quâ olim Romani uti solebant. Quemadmodum enim hi non prolixis libellis actiones intentabant, sed formulis utebantur, quas vel jure-consulti vel prætores prodiderant; e. g. aio hunc fundum qui in Campania est, meum esse ex jure Quiritium — aio Titium mihi centum ex mutuo dare oportere, &c., ita simili brevitate magnopere delectatos esse animadvertimus majores nostros. Tales sane sunt formulæ agendi in lege Alam. &c. (p)

NOTE 14. See * p. 49.

A *demurrer* cometh from the Latin word "*demorari* — to abide, and, therefore, he which demurreth in law, is * said [* xxvi] he that abideth in law — moratur or demoratur in lege." (q)

We find from the Year-books that the pleaders sometimes put themselves upon the judgment of the court upon a matter of law, in the following form of words: — "*Nous demurroins en vos discretions si nous etions mest a respond,*" &c. (r) Sometimes in the following — *sur ceo demurromus en jugement*, &c. (s) These expressions clearly indicate the manner of the derivation.

NOTE 15. See * p. 50.

Exceptionum quædam sunt dilatoriæ, quædam peremptoriæ, et hæc est prima et brevis divisio. (t) This division was borrowed from the canon or civil law. Thus it is said by the canonists, Est summa exceptionum divisio, quod aut sunt dilatoriæ, aut peremptoriæ. (u) And it is laid down in the Digest, Exceptiones aut perpetuæ et peremptoriæ sunt, aut temporales et dilatoriæ. (x)

NOTE 16. See * p. 51.

"Pleas are variously distinguished. The more general division of them is, that of being dilatory or peremptory; — or they are, first, pleas of *abatement*, — secondly, such as *suspend* the action, or thirdly, such as *bar* the action forever." (y)

(p) Heinecc. Elem. Jur. Germ. lib. iii. tit. iv. s. clvi.

(q) Co. Litt. 71 b.

(r) 1 Edw. II. 8.

(s) 10 Edw. III. 28.

(t) Bract. 399 b.

(u) Corvin. Jus Canon. lib. iii. tit. 32.

(x) Dig. lib. xlv. tit. i. sect. 3.

(y) Bac. Ab. Pleas, &c. (A.)

[* xxvii] The more general division of pleas is, 1st, Pleas * dilatory; 2ndly, Pleas peremptory. Of the former description are pleas to the jurisdiction, &c. Of the latter or peremptory kind, and which lead to an issue which finally settles the dispute, are pleas in bar of the action. (z)

The pleas to the *jurisdiction* are frequently mentioned as pleas in *abatement*; (a) but inaccurately; for in their *form* they are not pleaded as grounds for *abating the action*, but for *refusing to answer in the court*, in which the action is brought. It is true, that, in their *effect*, they defeat the action; but the case is the same with pleas in bar, which are yet essentially distinguished from pleas in abatement. "A plea to the jurisdiction is not properly a plea in abatement, though in its consequence it be so; and therefore is to have its proper conclusion, as *respondere non debet*, or *si curia cognoscere velit*: and not *quod billa cassetur*." (b)

All dilatory pleas, including those in *suspension*, as well as pleas to the *jurisdiction*, are sometimes inaccurately classed as pleas in *abatement*.

NOTE 17. See * p. 53.

A plea in abatement is called by Bracton, *exceptio ad breve prosternendum*: (c) and is described, about the same time in French, as *exception pur breve abatre*: (d) whence the words *abate* and *abatement*.

Cassare was another word applied, as well as *prosternere*, to express the abatement of the writ; (e) and from *cassare* is derived to *quash*, as to abate from *abatre*.

[* xxviii]

* NOTE 18. See * p. 57.

The alterations as to the pleas of *misnomer* and *non-joinder*, are in substance founded on the recommendations of the Common Law Commissioners. They thus state the objections to the former state of the law with respect to the plea of *non-joinder*.

(z) 1 Chitty, 441, 6th edit.; see also Bac. Ab. ubi *suprà*; Bract. 399 b.

(a) See Gilb. C. P. 187.

(b) Bac. Ab. Pleas, &c. (E. 2); see Boyer v. Book, 5 Mod. 146; Carth. 363; 1 Salk. 297, S. C.

(c) Bract. 431 b.

(d) Britton, 48.

(e) See Hengham's Summa.

“In actions on contracts it is also a rule, that if there are several joint contractors they must be all joined as defendants; and, if any one be omitted, the non-joinder may be pleaded in abatement, the effect of which plea is, to oblige the plaintiff to abandon his action, and commence another.

“This is attended, in many cases, with great hardship, for, under particular circumstances, it is often very difficult for the plaintiff, when he commences his suit, to determine how many persons may, in construction of law, have been parties to the contract, or to ascertain with precision their names, or to discover their residence; and even where not in ignorance on these points the residence of parties abroad may make it impossible for him, as the law now stands, to proceed against them, except by incurring the expense and delay of *outlawry*. Supposing none of these difficulties to occur, he may yet find himself as against some one of the parties, without the means of proper proof, and on that ground may be obliged to omit him, in order to avoid the danger of nonsuit at the trial. Though these good reasons may exist for omitting a joint contractor, yet the omission is always at the peril of a plea in abatement; and after the pleading of such plea, and when it has had the effect of compelling the plaintiff to discontinue his action, he often finds himself prevented by some of the same difficulties from safely instituting another. For if the * omitted [* xxix] defendant be out of the kingdom, or the means of proving his partnership in the contract are not in the plaintiff's power, these impediments are not removed by the plea, and the plaintiff's situation is just as embarrassing as before.” (f)

Their remarks on the plea of *misnomer* are as follows: —

“The effect of this plea is, that if the plaintiff admits the misnomer, either the proceedings must be quashed, or the expense and delay of an amendment must be incurred; while, on the other hand, if he thinks fit to take issue on the name, or to reply that the party is as well known by one denomination as the other, the verdict, if given in favour of the defendant, abates the suit, and throws its costs upon the plaintiff; and if given against the defendant, entitles the plaintiff to a peremptory judgment for the debt or damages, without any inquiry into the merits of the cause.

“We think it manifestly wrong to permit a formal issue to be thus joined upon a mere mistake of name, and to apply to it the

expensive apparatus of a trial by jury, or to allow it under any form of proceeding to operate decisively on the cause. The injustice and inconvenience of such a course of practice are the greater, because the error is (generally speaking) one of the most probable occurrence, and most venial description; and this remark applies more particularly to the frequent case of a misnomer of one of the parties of a mercantile house, whose name is not expressed in the firm, or of a defendant sued as a negociator of a mercantile instrument, whose person is unknown to the plaintiff, and who has used initials only, in the signature of his christian name. In [* xxx] criminal proceedings, an amendment in * this branch of the law has recently been carried into effect. In civil actions there is, we believe, a general and strong opinion, that the plea of misnomer ought to be abolished; and it is one in which we entirely concur." (g)

NOTE 19. See * p. 57.

A plea in bar is called by Bracton, after the civilians, *exceptio peremptoria*. In the French of Britton, it is described as an *exception*, *pur barrer le pleintyffe de sa demaunde*. (h) It is observable, that the terms *barrer* and *barre* were in common use in the law language of France, in the year 1270; (i) which is about the same period as when they first made their appearance in the English pleading.

NOTE 20. See * p. 57.

Traverse is the most proper and ancient term. (k) In the modern language of pleading, however, *deny* is often substituted for it; and *pleas in denial* is a term often used instead of *pleas by way of traverse*. The reason is, that *traverse* is a word that also occurs in a more limited sense, being often applied to a *particular form of denial*, of which there will be occasion, in the course of this work, to speak; and the word *deny*, as preventing confusion, is therefore usually adopted as the more convenient expression for the general idea. In this treatise, however, [* xxxi] ever, * denial, in general, is called by its proper appella-

(g) See 3d Report of Common Law Commissioners, p. 22.

(h) Britton, 92.

(i) Ducange, Gloss. verbo *Barræ*.

(k) See 1 Chitty, 576, 1st edit., and the authorities there cited. Bac. Ab. Pleas, &c. (H.); Finch, Law, 396, 397; *Lambert v. Stroother*, Willes, 224.

tion of *traverse*; and the particular kind of denial above-mentioned is denominated by the appropriate phrase, viz. a *special* or *formal traverse*. Any confusion is thus sufficiently avoided, and the regular and ancient terms of art are preserved.

NOTE 21. See * p. 63.

As a party who makes a statement of fact is said to *plead*, by way of distinction from *demurring*, — so such statement or allegation is, in strictness, called a *plea*; and when opposed to the declaration, is denominated a *plea* to the *jurisdiction*, in *suspension*, in *abatement*, or in *bar*, — at subsequent stages, a plea by way of *reply*, by way of *rejoinder*, &c. according to the stage at which it occurs. But as the name of *plea* is, in practice, generally understood to refer to that particular answer in fact which the defendant opposes to the declaration, and to that only, the word *pleading* will (to avoid ambiguity) be substituted, in this work, to express a statement of fact, in general, as opposed to a demurrer.

NOTE 22. See * p. 64.

The civilians and canonists described their pleadings in a somewhat similar manner; viz. as *intentio*, *exceptio*, *replicatio*, &c. Dig. lib. xlv. tit. 1, sect. 2; Corv. Jus Canon. lib. iii. tit. 32.

NOTE 23. See * p. 68.

Nothing has been here attempted but a *practical* explanation of the manner of coming to issue. If considered in * a view to its *abstract principle*, it will be found to consist in an application of that analytical process by which the mind, even in the private consideration of any controversy, arrives at the development of the question in dispute. For this purpose it is always necessary to distribute the mass of matter into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained. This ranks in the present day among those ordinary logical operations which it is easier to practise than to define, and which it would be superfluous to attempt to reduce to scientific rule. It was, however, as applied to the purpose of forensic disputation, a very favourite topic with the ancient writers on dialectics and rhetoric; and there was no

subject connected with these sciences on which they bestowed more elaborate attention. *Status excogitandi*, (says Sigonius,) atque eo probationes omnes conferendi, artificium, in libris oratorii, multis verbis est demonstratum: neque enim in aliis præceptis, antiqui rhetores, tam Græci, quam Latini, plus studii aut operæ consumpserunt. (l) The *question in controversy* is described among these writers by the different terms *κρινόμενον*, summa quæstio, res de qua agitur, quæstio ex qua causa nascitur, judicatio, and others of similar import, all expressive of the same general idea, though slightly distinguished from each other in their particular application. (m) When this question was developed, there was said to be a *status*, or *constitutio*, *causæ*. Of these status

there were many classes, according to the different kinds [* xxxiii] of questions which might arise, involving not only * the distinction recognised in our pleading, between questions of *fact* and of *law* (status conjecturales et legales), but additional distributions into status finitivæ, translativæ, and many others, corresponding with the various logical divisions under which the different subjects of civil dispute may be considered. As a specimen of this obsolete, but curious learning, and at the same time as the best illustration of what is the natural progress of the mind in effecting that development of which we have spoken, the following passage of Quintilian deserves attention. In that part of his work which relates to the dispositio, or the art of oratorical division and arrangement, — after noticing the importance of a prudent selection of the point of argument, and a discreet statement of the general question, and observing that the choice should be determined by the nature of the case which the orator was to support, — he proceeds, “ I will explain my own method in this particular, which I attained partly by precept, and partly by the natural deductions of reason, and of which I never attempted to make a mystery. In all forensic controversies I took care, in the first place, to inform myself of all the different matters involved in the cause. I say in forensic controversies, for as to the disputes of the schools, the operation is unnecessary, as they consist merely in the discussion of a few questions distinctly discriminated at the outset as the subjects for declamation, and denominated *δέματα* by the

(l) Car. Sigonius de Judiciis. See also Quintil. lib. iii. c. 6. Cic. in Topic. c. 25. Ger. Vossius, Instit. Orat.

(m) Quintil. et Cic. ubi suprà.

Greeks, by Cicero *proposita*. After thus placing then the whole matter of the controversy distinctly in my view, it was my habit to *analyse* it, as well on the part of my adversary, as on my own. And first, I applied myself to that which, though easily described, requires a peculiarly attentive performance, I mean, I ascertained what case it was the object of either party to make, and by what * allegation such cases might be respectively [* xxxiv] supported. With this view, I began by considering what might be alleged by the plaintiff. This statement would necessarily either be admitted or denied on the part of the defendant. If admitted, no question could at that stage arise. I therefore proceeded to consider what would be the defendant's answer; and to this I applied the same dilemma of admission or denial by the plaintiff. Accordingly, sometimes the matter of the answer would be admitted; but at all events there would, at some period of the process, arise a contradiction between the parties: and it is then that the question in the cause is first ascertained. For example — *You killed such a man*. Admitted. We proceed. The defendant must now assign some reason for this act, *It was lawful to kill him, as surprised in adultery with my wife*. There is no doubt of the law: we must therefore seek, in some other point, the subject of contention. *The parties surprised were not committing adultery. — They were.* — This then is the question — and it is a question of fact" (conjectura, i. e. status conjecturalis.) "In some cases, however, there might be a further admission. — *They were in adultery, but you had no right to kill him, for you were an exile, and infamous person*. And here arises a question of law. On the other hand, if to the first allegation, *you killed*, it had been answered, *I did not kill*, — the question had been ascertained at the outset. By this kind of process is the matter in dispute, or main question in the cause, to be investigated." (n)

This oratorical analysis of Quintilian exhibits exactly the principle of the English pleading; and when it is considered that the logic and rhetoric of antiquity were the * favour- [* xxxv] ite studies of the age in which that science was principally cultivated, and that the judges and pleaders were doubtless men of general learning, according to the fashion of their times, it is, perhaps, not improbable, that the method of developing the point in controversy was improved from these ancient sources. On the

other hand, however, it seems not to have been wholly derived from them, for the same method will appear in one of the following notes (*o*) to have been substantially in the possession of the barbarous Franks and Lombards, with whom it was, presumably, a native invention. "Whatever merit," says Gibbon, "may be discovered in the law of the Lombards, they are the genuine fruit of the reason of the barbarians, who never admitted the bishops of Italy to a seat in their legislative councils." (*p*)

NOTE 24. See * p. 82.

Trial has been long used to express the investigation and decision of *fact* only; but would appear to have originally signified *decision*, in general. For by Bracton, in the reign of Henry III., the word *triare* seems to be taken in that larger sense—Nunc dicendum ubi *triandæ* sunt actiones civiles, &c. (*q*) And Britton applies the French word *trier* in the same way. Thus, in speaking of the assise of darreign presentment, he says, si il aveigne que ils se consentent en un clerke, sans faire *trier* le droit, &c. (*r*) As for

the *origin* of the word *trial*, it appears by these quotations, that it is, like almost every term of * English law, of French extraction; being derived from *trier*. (*s*) Indeed, on this subject, we shall find the observation of the learned Craig perpetually verified: Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine. (*t*)

NOTE 25. See * p. 88.

Originally an action was triable only in the court where it was brought. But it was provided by Magna Charta, in ease of the subject, that *assises of novel disseisin and mortancestor* (which were the most common remedies of that day), should thenceforward, instead of being tried at Westminster, in the superior court, be taken in their proper counties, and for this purpose justices were to be sent into every county, once a year, to take these

(*o*) Vide post, NOTE 37.

(*p*) Decline and Fall, &c. vol. viii. p. 157.

(*q*) Bract. 105 a.

(*r*) Britton, c. 92.

(*s*) It is said by one writer, however, to be derived from the Saxon. See Ducange, Gloss. verbo *Triare*.

(*t*) Crag. Jus Feud. lib. i. d. 7.

assises there. (u) These local trials being found convenient, were soon applied, not only to assises, but to other actions; for by the Statute of Nisi Prius (13 Ed. I. c. 30), it is provided, as the general course of proceeding, that writs of venire for summoning juries to the superior courts shall be in the following form: *Præcipimus tibi quod venire facias coram justitiariis nostris apud Westm. in octabis Sôti Michaelis, nisi talis et talis, tali die et loco ad partes illas venerint, duodecim, &c.* Thus the trial was to be had at Westminster, only in the event of its not previously taking place in the county, before the justices appointed to take the assises.

This clause of *nisi*, or *nisi prius*, is not now * retained [* xxxvii] in the venire; but it occurs in the *nisi prius* record (vide sup. * pp. 84, 85), and in the judgment roll. (Vide * p. 125.) And it is this provision of the statute of Nisi Prius, enforced by a subsequent statute of 14 Ed. III., c. 16, which authorises, at the present day, a trial before the justices of assise, in lieu of the superior court, and gives it the name of a trial *at nisi prius*. (x)

NOTE 26. See * p. 112.

Without entering into the well contested field of controversy on the question whether the method of *trial by jury* was of Anglo-Saxon or of Norman origin, it may be sufficient to sum up the result of the dispute thus:—There is, on the one hand, some evidence of the occasional existence of an *inquisitio patriæ*, or inquisition by a jurata of twelve, in England, before the Conquest; though with what frequency it may have then occurred, it is very difficult to determine. On the other hand, it clearly existed as an ordinary mode of decision among the Scandinavian ancestry of the Norman invaders. (y) The same species * of [* xxxviii] inquisition also existed among the Normans them-

(u) 1 Reeves, 246.

(x) For further information on this subject, see *Introd. to Sellon's Practice*, lxxv.; 3 Bla. Com. 53; 1 Reeves, 245, 282; 2 Reeves, 170; 2 Inst. 424; 4 Inst. 159.

(y) *Hæc Nembdæ ratio etiam hodie, non in Dania tantum, sed etiam in Anglia superstes est, ex eo procul dubio jure quod Dani et Normanni olim in Angliam invexerunt.* — *Stiernhook de Jure Sue. et Goth. lib. i. c. 4.* *Apud veteres Danos, Suecos et Norwegos multa de hoc instituto, quod Namd vel Næmd nunc Nembd vocant, leguntur. Nambd autem, i. e. nominatio, vocatur apud eos duodecimviralis juratorum numerus, &c.* — *Hickes, Thes. Diss. Epist. 39.* The latter author, at the same

selves, (z) and was in force in Normandy at least as late as the year 1654; for in the *Commentaires de Terrien*, published in that year, it is said, *Enqueste est recognoissant de verité de la chose de quoy est, par le serment de douze chevaliers, ou de douze autres preudes hommes (probos homines) creables, et qui ne soyent pas soupçonneux.* (a) And the same author observes, *Par la coustume du pays, un faict ne chet point en enqueste, en tel cas* (i. e. *matiere hereditale*) *s'il ne'st ou peut estre notoire au voisiné.* (b)

Whatever may have been the ultimate origin of this method of decision, it is, at all events, clear, that it was occasionally in use in this country, at least as early as the reign of Henry II., for it is expressly mentioned by Glanville under the name of *Jurata patriæ sive visineti.* (c) But it is equally clear, on the same authority, that it was not then in *ordinary* use. Prior to a certain law of Hen. II. not now extant, it seems that this mode of decision had belonged only to a *few specific cases*; the enumeration of all, or most of which may be found in Glanville. But in the reign of that monarch, the law above-mentioned passed, authorising the application of the *jurata patriæ*, or inquisition of twelve men, to certain questions of *seisin*; which appear before that time to have been decided by *wager of battel* only. This ordinance, like other laws of that day, (d) was called *assisa*, or *an assise*; and when an inquisition by a *jurata patriæ* took place by virtue of its provisions, such inquisition was called a *recognition of * assise.* [* xxxix]

The *recognition of assise* became so popular, that suitors were led to adopt the same method by *mutual consent*, or by advice of the court, (e) even for the decision of questions for which the ordinance of Hen. II. did not provide, and which they would otherwise have been obliged to settle by *wager of battel*. The proceed-

time, combats the opinion that the method was known among the Anglo-Saxons, and attempts to show that the passages cited in support of that opinion have been misunderstood. In this, however, he opposes himself to Coke, Spelman, and Selden; and the authority of these great names is fortified by the coincident opinion of Mr. J. Blackstone.

(z) Vide the *Grand Coustumier*, lxxxiv, &c.

(a) *Comment. de Terrien*, liv. ix. ch. xxxiii.

(b) *Ibid.* liv. ix. ch. xxvii.

(c) *Glan. lib. ix. c. 11*, *lib. vii. c. 16*, *lib. v. c. 4*.

(d) See *Co. Litt.* 159 b.

(e) *Tunc ex consensu ipsarum partium, tunc etiam de consilio curiæ.* *Glan. lib. xiii. c. 2.* And see *Plac. Ab.* 146; *Berk.* 147; *Suht*, &c.

ing, when thus instituted by consent of the parties, or advice of the court, was called *jurata ex consensu*, to distinguish it from the regular *recognition of assise* appointed by law. This *jurata ex consensu*, which is the modern *trial by jury*, continually increased in favour, from the time of Glanville; and, at the date of Bracton's work, had become the most ordinary method of deciding fact. (*f*)

NOTE 27. See * p. 115.

Such of the different modes of trial now in use as are of extraordinary and limited application, are the relics of a very ancient system of deciding fact, established before the full introduction of *trial by jury*. (*g*) And in addition to these, there were the *trial by battel*, by the *grand assise*, by *wager of law*, and by *inspection*, all now abolished, though extant up to a very recent period. (Vide sup. * pp. 28, 83.) The *wager of battel* and the *grand assise* occurred upon writs of right. The former was a judicial *combat between armed persons to try [*xl] "whether the tenant or the demandant had the greater right." The latter was a trial by four knights and twelve ordinary jurors, to try an issue of the same description. The *wager of law* occurred principally in the action of debt on simple contract, upon the issue whether the defendant owed the debt demanded. And the course of proceeding was for the defendant to bring into court with him eleven of his neighbours, and for the defendant himself to make oath that he did not owe the money, and for the eleven to swear that they believed him to speak the truth; upon which the defendant was entitled to judgment. (*h*) The trial by inspection occurred in some cases, where the issue was taken on the nonage of one of the parties; and the course of proceeding was to bring the party himself into court, to be inspected by the judges. (*i*)

(*f*) The same account of the establishment of trial by jury, is given by Mr. Reeves, vol. i. 177, 334; and is perhaps stated in no other work with sufficient precision. A careful perusal of Glanville and Bracton will leave no doubt as to its correctness.

(*g*) Considerable insight into this ancient system of trial may be obtained by an attentive perusal of the work of Glanville, the earliest and best authority. It is a subject, however, that has never yet been thoroughly elucidated.

(*h*) 3 Bl. c. 343. This proceeding seems to have been of Norman origin. See *Grand Coustum.* cxxvi.

(*i*) Vin. Ab. Trial, (B. 2), 10, cites 29 Ap. xxxvii. 19 (E. 2).

Though it would be foreign to the present purpose to attempt to explain fully the meaning and policy of this curious system, yet there is one general observation which throws so much light on that subject, that it may, without impropriety, be here introduced. The observation relates to the defective state, during those barbarous ages when the foundations of this system were laid, of the proper and rational sources of judicial proof. In times when the arts of reading and writing were comparatively rare, and when parchment had not yet been superseded by the invention of paper, written documents were of course by no means so frequently in use as the occasions of life would require, even after making due allowance for the comparative paucity, at [* xli] that period, of commercial transactions. *This circumstance at once increased the necessity for resorting to living witnesses, and at the same time, by rendering perjury less open to conviction, must have tended to diminish the security of that mode of proof. Whatever the cause, the fact is certain, that perjury was at this era a crime of peculiarly frequent occurrence, and consequently oral testimony a species of evidence of the lightest and most doubtful kind. It seems evident, too, that in a scanty population there must have been considerably less publicity, than in the present day, in almost every kind of occurrence, and that while witnesses were, on the one hand, less to be depended upon, so, on the other, they were less easily to be found. In this state of things, it is not surprising that attempts should be made to strengthen this, the ordinary mode of judicial investigation, by such corroborative tests as the opinions and manners of the times might approve, or to supply the want of it by other kinds of probation. Thus the oath of the defendant himself, in opposition to the claim of his adversary, would, under such circumstances, naturally have but little weight. At the same time, he might be unprovided with writing or witness. He was therefore, by way of suppletory expedient, required to support his own oath by *wager of law*, that is, by the adduction of many other persons, as his compurgators, who, though unacquainted with the transaction itself, yet knew the character of the party, and had sufficient confidence in it, to swear that they believed his assertion true. Thus too, when this proof by *wager of law* was, from the importance of the question, or for other reasons, deemed inapplicable, and that by witnesses alone, considered insufficient, resort was often had to

judicial combat, as the best means that offered itself for deciding between opposite assertions. (*k*)

* With respect to the great prevalence of perjury at this [* xliii] period, the latest and one of the most able and accurate delineators of the middle ages, thus notices that feature in the morals of the day.

“ One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury. It seems to have almost invariably escaped human punishment; and the barriers of superstition were in this, as in every other instance, too feeble to prevent the commission of crimes. Many of the proofs by ordeal were applied to witnesses, as well as those whom they accused; and, undoubtedly, trial by combat was preserved in a considerable degree on account of the difficulty experienced in securing a just cause against the perjury of witnesses. Robert, king of France, perceiving how frequently men forswore themselves upon the relics of saints, and less shocked apparently at the crime than at the sacrilege, caused an empty reliquary of crystal to be used, that those who touched might incur less guilt in fact, though not in intention. Such an anecdote characterises both the man and the times.” (*l*)

NOTE 28. See * p. 135.

The only material authorities on the subject of pleading, of date prior to the reign of Edw. I., are, the treatises of Glanville in the time of Hen. II., — that of Bracton, in * the latter [* xliii] end of the reign of Hen. III. — and the *Placitorum Abbreviatio*, which contains extracts from the Records, from Ric. I. to Edw. II. inclusive. (*m*) From these authorities it would appear that the manner of pleading was extremely imperfect, and that

(*k*) In the time of Glanville the wager of battel was applied not only * to the question of mere right, but to a great variety of other [* xlii] cases; and was one of the most general and ordinary modes of deciding fact. Thus he says, *Probari solet res debita ex empto, vel ex commodato, generali probandi modo in curia, scilicet per scriptum vel per duellum*. — Glan. lib. x. c. 17.

(*l*) Hallam's *View of the State of Europe during the Middle Ages*, vol. ii. p. 458, 1st edit.

(*m*) As to the *Mirror*, it is not to be relied upon as authority in respect to any period prior to Edw. I. See Reeves' *Hist.* vol. ii. 359.

many of the most important rules of the science were either unknown, or but partially observed in practice, so late as the end of the reign of Hen. III. On the other hand, the very earliest reports in the *Year-books* (which begin with the reign of Edw. II.) exhibit proofs that the pleading was by that time in a comparatively perfect state. It is therefore that the author has been led to consider the reign of Edw. I. as the era at which the manner of allegation may be said to have been first methodically formed and cultivated as a science.

It would be easy to produce numerous proofs that the pleading was very imperfectly regulated till the end of the reign of Hen. III. But the following will suffice.

Glanville gives scarcely any rule that can strictly be considered as a rule of pleading, though he is copious on subjects which would have led him to notice such rules had they existed. (n)

In the time of John we find instances of pleas which *neither traverse nor confess*. Thus, in answer to a fine, it is pleaded, *quod si finis ille factus fuit, per deceptionem et fraudem factus fuit, &c.* (o) Again, where a defendant had pleaded a deed made by the father of the plaintiff, the plaintiff replies, *quod cartam quam profert sub nomine patris sui nec dedit, nec concedit, &c.*, [* xliv] *sed qualiter carta * illa facta fuit, vel a quo, semper postquam facta fuit, presentavit pater ejus personam, &c.* (p)

In the same reign numerous examples of the fault of *duplicity*, i. e. pleading several allegations in answer to the same matter, are to be found. Thus, in an assise of mortancestor, the tenant pleads that the demandant was seised himself post obitum of the ancestor; and by fine, of which he produces the chirograph, quit-claimed, &c. the land. The demandant replies, *quod ipse nunquam fuit seisitus de terra quam petit, nec unquam eam tenuit. Et inde ponit se super assisam, &c. Et cum habuerit seisinam talem, &c. bene ostendet quod concordiam illam non fecit, nec facere potuit. Et petit sibi allocari quod chirographum illud non est factum in formâ aliorum chirographorum, &c.* and so argues against its genuineness. (q)

In the same reign the fault of *argumentativeness* appears to have

(n) Glan. lib. xii. c. 14.

(o) Plac. Ab. 38; Bedd. rot. 4.

(p) Plac. Ab. 92; Kent. rot. 22; and see 48 Linc. rot. 7; 39 North. rot. 6, &c.

(q) Ibid. 88; Sussex, rot. 22; and see 48 Linc. rot. 7; 50 Buck. rot. 2; 59 Linc. rot. 5, &c.

been common. Of this the following entry may serve as an example: *Dicit quod Ranulphus non potuit dare illam terram in maritagio, quia obiit inde seiscitus. Et inde ponit se super juratam.* (r)

All these are clear violations of rules of pleading subsequently established, and still in force; and appear to have encountered no objection from the opposite party.

In the reign of Hen. III., much attention certainly appears to have been paid to the manner of pleading; and Bracton not only makes constant reference to that subject, but has a division of his work expressly allotted to it, under the head, *De Exceptionibus*. Yet on careful *perusal of that work, the [* xlv] most convincing proofs may be found that the regular and methodised plan of allegation, which we find soon afterwards established, and which has since received the name of the *system of pleading*, was in his time not fully formed. For besides that the very title, *De Exceptionibus*, is borrowed from the Pandects, and is rather applicable to the nature of the Roman than the English pleading, and that he often uses appellations peculiar to the civil law, (s) it will be found that scarcely any of the more important and fundamental rules of the present system are noticed by this author. Even the word "issue" does not occur, and instead of it is used the civil law term *litis contestatio*; (t) a phrase by no means exactly parallel, though expressive of the same general idea. The rule against duplicity, indeed, is given; but in such a form as to raise a doubt whether its true extent and object were understood by the writer. *Si plures peremptoriæ (exceptiones) actionum concurrent, unam debet tenens proponere et probare, &c. quia si tenens cum duas peremptorias proponeret vel plures exceptiones, in probatione unius deficeret, posset recursum habere ad alias, et probare, sicut posset se pluribus baculis defendere: quod esse non debet, cum ei sufficere debeat tantum probatio unius.* (u) Again, it may be observed, that neither the rule obliging the pleader to traverse or confess, nor that against argumentative pleading, appears to have been perfectly established in the time of this author. Thus, he mentions it as one of the pleas to an appeal of rape,

(r) 59 Linc. rot. 79; 79 Warr. rot. 2.

(s) For example, *exceptio iudicis non sui* — *exceptio falsi procuratoris*. — Bract, 400 a.

(t) Bract. 378 a, 172 a, 435 b.

(u) Bract. 400 b. Something seems to be omitted in this passage, which renders its construction imperfect.

quod anno et die quo hoc fieri debuit, fuit alibi extra [* xlvii] *regnum, vel in provincia, in tam remotis partibus, *quod verisimile esse non poterit*, quod hoc quod ei imponitur, fieri posset per ipsum. (v) And again, among the pleas to an assise, the following is mentioned — liberum tenementum *habere non potuit, quia non tenuit tenementum illud, nisi ad terminum annorum, &c.* (x)

While there are these reasons for holding that in the reign of Hen. III. even the more fundamental principles of pleading were as yet imperfectly settled, a careful perusal of the Year-books will prove that not only had these principles become well established in the time of Ed. II., but that many of its more subtle and artificial rules were beginning in that reign to be observed. Thus, the doctrine and practice of pleadings in estoppel and of protestation will be found distinctly developed in 17 Ed. II. 534, and the objection as to negatives pregnant occurs in 7 Ed. II., 213, and again, *ibid.* 226.

With respect to the subsequent history of the science, Mr. Reeves holds that it was in a state of progressive advance till the reigns of Hen. VI. and Ed. IV., when it was "cultivated with so much industry and skill that it was raised to a sudden perfection in the course of a few years." (y) Sir M. Hale, however, complains that at that period the judges and pleaders had already become "somewhat too curious, and that the science had degenerated from its primitive simplicity; which, how these later times have improved, the length of the pleadings, the many and unnecessary repetitions, the many miscarriages of causes upon small and trivial niceties in pleading, have too much witnessed." And both that author and Sir E. Coke commend the reign of Ed. III., as the [* xlvii] *period when pleading had attained its highest point of excellence. (z) The excessive refinement and prolixity, of which Sir M. Hale complains, were abuses which continued to exist till long after his day; and though, in modern times, much checked and discouraged, are, perhaps, not yet entirely extirpated.

NOTE 29. See * p. 136.

The *issue* is thus defined by Lord Coke: — "Issue, — exitus, — a single, certain, and material point, issuing out of the allegations

(v) Bract. 148 a.

(x) Bract. 268 a.

(y) 3 Reeves, 424.

(z) Hale's Hist. 173, 176; 1 Inst. 304 b.

or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative, to be tried by twelve men." (a) And thus by Heath, C.J. — "That point of matter depending in suit, whereon the parties join, and put their cause to the trial of the jury." (b) These definitions, besides being too narrow, as extending only to questions of fact, and to such questions of fact as are referred to one particular mode of trial, viz. that by jury, seem to be also defective in clearness and precision. The definition of the issue by Mr. Justice Blackstone, (following Sir M. Hale), is as follows: — "When, in the course of pleading, they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue." (c) The definition by Finch, is, perhaps, preferable: — "An issue is, when both the parties join upon somewhat that they refer unto a trial, to make an end of the plea" (i. e. suit). (d)

* NOTE 30. See * p. 139.

[* xlvi]

We find in the Assises de Jerusalem (as to which, vide *suprà*, * p. xiv.) the following directions to the pleader, on the subject of brevity and precision. As plus *briefves* paroles que il pora, die sa parole — *car les plus briefves paroles et entendaument dites, son meaus entendues et retenues et recordees et jugees, et quant mestier, ques les autres: i. e.* let the pleader make his claim in the shortest form of words possible, and let him speak as intelligibly as he can, for the shortest and most intelligible expressions are the best heard and retained, and recorded and adjudged upon. (e)

The remark in the text may also be illustrated by the following curious specimens of the manner of pleading among the *Lombards*, as preserved in a compilation of undoubted authenticity.

"Petre, te appellat Martinus, quod tu malo ordine (*i. e. injustè*) tenes terram in tali loco positam. Illa terra mea propria est. per successionem patris mei. Non debes ei succedere, quia habuit te ex sua ancilla. Verè; sed fecit eam widerhora (*i. e. liberam*) sicut est Edictum, et tulit ad uxorem. Approbet ita, aut amittat." (f)

(a) Co. Litt. 126.

(b) Heath's Maxims, ch. iv.

(c) 3 Bla. Com. 313; Hale's Analysis, sect. L.

(d) Finch, Law, 396.

(e) Assises de Jerusalem, xxx.

(f) Leges Langobard. ap. Muratori. Leges Liutpran. lib. vi. 53.

“Petre, te appellat Martinus, quod terra quæ in tali loco est, sit sua; tu eam detines. Etiam, quia possedi per xxx annos. Verè possedisti, sed per chartam falsam quam dixisti patrem meum fecisse tibi. Non est verum. Ita. Probato.” (g)

“Petre, te appellat Martinus, quod tu dedisti sibi vadia [*xlix] te dare sibi unum solidum iii kalendi. Augusti. Non *dedi ipsa vadia. Tunc ipse qui appellat, probet. Si non potuerit, ipse qui appellatus est, juret quod in tali tenore vadia non dedit.” (h)

The following specimen is of a somewhat later era, when Lombardy had fallen under the *Francic* dominion:—

“Petre, te appellat Martinus, quod tu tenes malo ordine terram in tali loco. Ipsa terra mea propria est, per chartam quam tu mihi fecisti; et ecce chartam. Ego feci ipsam chartam, sed per virtutem (i. e. *vim*). Non fecisti. Vis ei probare? Volo. Vadiate pugnam.” (i)

These specimens of the pleading of a barbarous nation have drawn from a foreign writer of superior taste a warm eulogium:—“Le formole dell’ intentar le liti,” says Denina, “erano sì semplici, e sì spiccie, e sì chiare, che non cedevano a quella sì giustamente lodata forma del procedere che regna tuttavia in alcuni tribunali dell’ età nostra.” (k)

NOTE 31. See *p. 140.

Omnia hæc (says Heineccius, speaking of the pleadings of the civilians and canonists, as opposed to those of ancient Germany), *non vivâ voce* proferebant, sed *scripta* offerebant judici; ex eoque nata est ingens actorum forensium moles—quum sæpè integris voluminibus, causam suam tueantur litigantes, quam olim, paucissimis verbis, non minus dextrè perorabant. (l)

[*1] * In France written pleadings were in use at least as early as 1364. By an ordinance of Charles V. of that date, art. 3,

(g) Ibid. *Leges Liutpran.* lib. vi. 62.

(h) Ibid. *Leges Rachis*, c. 1.

(i) Ibid. *Leges Ottonis*, ii. c. 5. The above extracts are taken from the *Leges Langobardicæ*, with the *Formulæ Veteres* annexed, as published from ancient MSS. by Muratori, in his *Scrip. Rer. Italic.* vol. i. These laws had been previously published by Lindenberg; but without the *Formulæ*.

(k) *Rivoluzioni d’Italia* di Denina, vol. i. p. 316.

(l) J. G. Heinecc. *Elem. Jur. Germ.* lib. iii. tit. iv. sect. clviii.

another of Charles VII. in 1446, art. 24 and 37, and another of Charles VIII. in 1490, art. 92, advocates are required to draw up their writings in as concise a manner as possible. — Domat. vol. ii. book ii.

NOTE 32. See * p. 141.

In *Bracton* (as observed in a former note), the attainment of the issue is called *litis contestatio*, which is a word used by the civilians to express the same general idea. Thus, he says, — usque ad *litis contestationem*, scilicet quousque fuerit præcisè responsum intentioni petentis, et ita quod tenens se posuerit in magnam assisam, vel defenderit per Duellum. (*m*) And in another place, — Non tenetur aliquis hæres, de facto, scilicet de disseysinâ, antecessoris sui, quoad pœnam disseysinæ, licet teneatur ad restitutionem; et hoc nisi *lis contestata* fuerit cum suo antecessore, &c. (*n*)

It may be worth while to observe here that Blackstone's idea of the meaning of this term of the civil law, is inaccurate. He considers it as "a general assertion that the plaintiff hath no ground of action." (*o*) This, however, is not the sense in which it is properly or commonly used in the civil law, though it may occasionally have that meaning. It is clear that its usual signification is exactly that in which it is used by Bracton, viz. the development of the point in controversy; or as it is now expressed, the coming to *issue*. "In common parlance denying the truth of the defendant's exception, or, indeed, whenever *parties come to [*li] direct affirmance on one side, and denial on the other, is called a contestation of suit." (*p*) *Litis contestatio* non aliud est quam intentio actoris, et contradictio seu depulsio rei; adeo ut ex actione, et oppositâ peremptoriâ exceptione, consurgat; et comprehendat illud in quo tota controversia consistat. (*q*) And Fortescue is express to the point: for, in treating of the method of proof in the civil law, he says, — Si coram iudice contententes ad *litis pervenient contestationem*, super materiâ facti, quam legis Angliæ periti *exitum placiti* (the issue) appellant, *exitus hujusmodi veritas*, per leges civiles, *testium depositione*, probari debet. (*r*)

(*m*) Bract. 373 a.

(*n*) Ibid. 172 a.

(*o*) 3 Bl. Com. 296.

(*p*) Brown's Civil Law.

(*q*) Voet. ad Pandect. lib. v. tit. i. sect. 144.

(*r*) Fortescue de Laud. c. 20.

NOTE 33. * See p. 145.

That juries were originally composed of witnesses, or persons cognisant of their own knowledge, of the fact in question, seems to be sufficiently proved by the following authorities.

In an assise of darreign presentment, in the reign of Richard I., the jurors find a special verdict in these terms. Assisa dicunt quod *nunquam viderunt* aliquam personam præsentari ad ecclesiam de Duneston, sed semper tenuerunt personæ, persona in personam, ut de patre in filium usque ad ultimam personam quæ ultimo obiit. (s)

In an assise of novel disseisin, in the same reign, there is the following entry. Assisa venit recognitura si Adam de Greinvill et Willielmus de la Folie dissaisaverunt injustè et sine iudicio Willielmum de Weston de libero tenemento suo in Suto, post [* lii] primam coronationem Domini Regis. * Juratores dicunt quod *non viderunt* unquam aliam saisitum de tenemento illo, nisi Willielmum de la Folie. Et quod nesciunt si Willielmus de la Folie dissaisisset eum inde vel non. *Consideratum est quod alii Juratores elegantur qui melius sciant rei veritatem.* Dies datus est eis ad diem Mercurii. (t)

In the reign of John, there is the following entry:—

Juratores dicunt quod ecclesia Sanctæ Helenæ de G. nunquam fuit capella pertinens ad ecclesiam Sancti Michaelis super Wir, quæ est de donatione Dom. Regis; *sed semper temporibus suis iudicaverunt illam esse matricem ecclesiam.* (u)

So, upon a question, whether the plaintiff, claiming to be tenant by the courtesy, had issue by his wife, Bracton says, Si dicant juratores *quod bene viderunt* eum seysitum et postea ejectum per tenentem, sed de aliquo puero nihil sciunt, quia mater obiit in pariendo, extra comitatum, in remotis, — quia eorum veredictum insufficiens est, *et quia ipsi ignorare possunt ea quæ fiunt in remotis, recurrendum erit ad comitatum et ad vicinetum ubi mater obiit*; et ibi facta inquisitione de veritate, terminetur negotium. (x)

And see 2 Reeves, 270, where the doctrine, in support of which these authorities are cited, is distinctly laid down.

It may also be observed, as affording confirmation of this doctrine, that the award of a venire facias still directs the jury to

(s) Plac. Ab. 3, Norfolc.

(t) Plac. Ab. 11, Wiltesir.

(u) Plac. Ab. 94; Lanc. rot. 3.

(x) Bract. 216 a.

be summoned to *recognise*, &c., (v. sup. * p. 85), that is, (properly), to declare *upon their recollection*. That the word was anciently used in that sense appears from many entries. For example, in the reign of John we find a jury declaring, quod ipsi *recognoverunt* quod interfuerunt ubi Ricardus de W. coram ipsis et pluribus aliis, &c., propria voluntate vendidit terram suam, &c. (y)

* NOTE 34. See * p. 148.

[* liii]

The author being the first who has attempted to develop the principles on which the system of pleading is founded, he is unable to cite any direct authority, either for the enumeration contained in the text, of the objects which that system contemplates, or even for the account there given, of the properties or qualities required in the issue.

Yet passages, sufficient to justify both the one and the other, may be easily collected from the books,

First, as to the properties of the issue.

Lord Coke defines the issue to be “a *single*, *certain*, and *material* point, issuing out of the allegations or pleas of the plaintiff and defendant.” (z) He considers these properties, therefore, to be of the very definition of the term;—though, perhaps, they are more properly incidental to the issue, than of its essential nature. So, it is laid down in Comyn’s Digest, that “the issue must be upon a *material* point,” (a) and “must be upon a *single* and *certain* point.” (b) So it is said by Lord Coke, that “the law prefers and favours certainty, as the mother of quiet and repose; to the intent, that either the court shall adjudge thereupon, if the plaintiff demurs, or that a *certain* issue may be taken upon *one certain point*,” &c. (c) So, in the Year-books, we find the court interrupting the pleader, with this remark;—“Vous dites chose que veot avoir *deux issues*:—*tenez vous al une*.” (d)

* With respect to the doctrine, that the system of plead- [* liv]
ing contemplates the different objects enumerated in the text, and that these form the secret foundation of most of its principal rules, the author must refer, for his chief authority. to the intrinsic evidence arising from the consideration of the rules

(y) Plac. Ab. Dorset, rot. 20.

(z) Co. Litt. 126 a.

(a) Com. Dig. Pleader, (R. 8.)

(b) Com. Dig. Pleader, (R. 4).

(c) Leyfield’s case, 10 Rep. 90 a.

(d) 1 Edw. II. 14.

themselves, as subsequently explained in this Work. In treating, however, of these different rules, he will be able, occasionally, to offer some citations from the books, in a great measure confirmatory of the same view.

NOTE 35. See *p. 155.

The general effect of these statutes, relative to special demurrer, is well expressed by Lord Hobart, who says, in reference to the 27 Eliz. c. 5, "The moderation of this statute is such, that it does not utterly reject *form*; for that were a dishonour to the law, and to make it in effect no art; but requires only that it be *discovered*, and not used as a secret snare to entrap. And that discovery must not be confused and obscure, but special; therefore it is not sufficient to say, that the demurrer is *for form*; but he must express what is the *point and specialty of form* that he requires." (e)

NOTE 36. See *p. 170.

In *dower*, the plea of *ne unques seisie que dower* is often mentioned as the general issue. But it does not seem to fall strictly within the definition of that term. In fact, though [*lv] it concludes to the country, it does not, properly *speaking, contain any denial or traverse of the count, (see its form. 10 Went. 159.) and must therefore be considered as an anomaly, or exception in the system of pleading. The reason is, perhaps, to be found in the great antiquity of this action of *dower*, which was in full use at least as early as the time of Glanville; a period considerably anterior to the complete establishment of the doctrine of issue, and of the rules by which it is produced.

Another exception of the same kind was to be formerly found in another action of equal antiquity, — the *writ of right*. In this form of proceeding (which is now abolished,) there was a plea called the *Mise on the mere right*, which was considered as the general issue, yet contained no denial of the count.

NOTE 37. See *p. 173.

It may be useful to give at length, in this place, the important Rules of Hil. T. 4 Will. IV., by which the effect of the general issue, in each action, is for the future determined.

(e) *Heard v. Baskerville*, Hob. 232.

I. *Assumpsit*.

1. In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non-assumpsit* shall operate only as a denial in fact, of the express contract of promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy, by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

* In actions against carriers and other bailees, for not delivering, or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law, to the effect alleged, but not of the breach. [* lvi]

In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non-assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant, a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, ex. gr. the drawing or making, or indorsing, or accepting or presenting, or notice of dishonour of, the bill or note.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those that show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded, ex. gr. infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law; drawing, indorsing, accepting, &c. bills or notes, by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

II. *Covenant and Debt.*

1. In debt on specialty, or covenant, the plea of *non est* [* lvii] ** factum* shall operate as a denial of the execution of the deed, in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of *nil debet* shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead, that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non-assumpsit*, in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specially some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. *Detinuit.*

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. *Case.*

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

[* lviii] * Ex. gr. In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial, only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house; and will not operate as a denial of the plaintiff's occupation of the house.

In an action on the case, for obstructing a right of way, such

plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way: and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

V. *In Trespass.*

1. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant
* committed the trespass alleged in the place mentioned, [* lix]
but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

2. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

It also seems worth while to extract that part of the Report of the Common Law Commissioners, on which the preceding Rules were founded.

“One of the most important questions which has presented itself in the course of our inquiries is, whether it is expedient to continue to any, and to what extent, the use of that kind of plea

denominated the *General Issue*. Under this plea, which is in its shape a summary form of denial of the allegations in the declaration, or some principal part of them, a defendant is at present allowed in certain actions to put the plaintiff to the proof of everything alleged in the declaration; and in some not only to do this, but at the same time to prove in his own defence almost any kind of matter in confession and avoidance; that is matter which, admitting the truth of the plaintiff's allegations, tends to repel or obviate their effect. On the other hand, there are some kinds of actions, in which, if the defence consists of any matter in confession and avoidance, it must be specially pleaded, and cannot be admitted in proof under the general issue; and there are others, in which, properly speaking, there is no general issue, and in which all the pleading may be considered as special.

[* lx] * "That the present state of the practice on this subject requires alteration, seems to be universally felt; but with respect to the kind of alteration required, the views taken by different persons are surprisingly dissimilar: one set of opinions pointing to the restriction of the general issue, and another to its wider application, and to a corresponding extinguishment of special pleading. It will be found, however, on reference to the written communications addressed to us, that there is a decided preponderance of authority in favour of the former course; and we do not hesitate to declare our own strong conviction, that it is the right one, and that its adoption would be attended with highly beneficial results.

" We conceive that considerable misapprehension popularly prevails upon the subject of *special pleading*. That system was characterised, no doubt, at former periods of our legal history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an overstrained observance of form; and notwithstanding material modern improvements, it still exhibits too much of the same qualities. These, its disadvantages, are prominent, and well understood; its recommendations are, perhaps, less obvious, but when explained, cannot fail to be recognised as of far superior weight. Special pleading, considered in its principle, is a valuable forensic invention, peculiar to the common law of England, by the effect of which, the precise point in controversy between the parties is developed, and presented in a shape fit for decision. If that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to be decided by the

jury, and are enabled to prepare their proofs with proportionate precision. If, on the other hand, it turns out to be matter of law, they have the means of immediately obtaining the decision of the cause, without the expense * and trouble [* lxi] of a trial, by demurrer,—that is, by referring the legal question so evolved, to the determination of the judges.

“But where, instead of special pleading, the general issue is used, and under it, the defendant is allowed to bring forward matters in confession and avoidance, these benefits are lost. Consisting, as that plea does, of a mere summary denial of the case stated by the plaintiff, and giving no notice of any defensive allegation on which the defendant means to rely, it sends the whole case on either side to trial, without distinguishing the fact from the law, and without defining the exact question or questions of fact to be tried. It not unfrequently, therefore, happens, that the parties are taken by surprise, and find themselves opposed by some unexpected matter of defence or reply, which, from the want of timely notice, they are not in due condition to resist.

“But an effect of more common, and indeed almost invariable occurrence, is the unnecessary accumulation of proof, and consequently of expense; for as nothing is admitted upon the pleadings, each party is obliged to prepare himself, as far as it is practicable, with evidence upon all the different points which the nature of the action can by possibility make it incumbent upon him to establish, though many of them may turn out to be undisputed, and many of them may be such as his adversary, if compelled to plead specially, would have thought it undesirable to dispute.

“With respect to matters of law, the inconvenience experienced, though of a different kind, is not less remarkable; for when points of law arise upon the general issue, instead of being developed, by way of demurrer, for adjudication by the full court in *banc*, they are of necessity left to the decision of the single judge before whom the * cause is tried; and the decision, upon [* lxii] his sole authority, deprived as he generally is of the advantage of any previous intimation of the matter to be argued, and unable to refer to books, is often found to be unsatisfactory and inconclusive. It may even happen (and that is not an unfrequent occurrence), that the controversy under this form of plea, turns entirely upon matter of law, there being no fact really in dispute; and in that case the mode of decision by jury is not only defective but misplaced, and the trial might have been spared altogether, if

the parties had proceeded by way of special pleading, and raised the question upon demurrer.

“ Another ill consequence attendant upon the general issue is, that as the true point for decision has not been evolved in the pleading, it becomes the business of the judge to extract it from the proofs and allegations before him, to sever correctly the law from the fact of the case, and, again, the facts admitted, from those in controversy, and to present the latter in a distinct shape to the jury for their consideration; an analysis, which the rapidity and tumult of a trial at nisi prius renders extremely difficult, and which is often defectively conducted.

“ Of the state of things here explained, it is the natural effect, that when the general issue is pleaded, the trial fails in numerous instances to accomplish the purposes of justice, or even to terminate the legal dispute, and is followed by the application of the defeated party to the full court in *banc* for a new trial. This proceeding involves the necessity of recapitulating, for the information of that court, the whole of what passed *vivâ voce* at nisi prius, of which there is no admissible report, except that of the presiding judge, upon whose alleged error in point of law the application most commonly is founded. The motion for new trial is for [* lxiii] this reason beset with peculiar * difficulties; the effect of which is, that it ultimately fails in many cases (as there is reason to apprehend), where in justice it ought to succeed, and succeeds in many cases where there is in reality no sufficient ground for the application. It may be added, that even where successful, it gives no redress beyond that of awarding a new and expensive inquiry upon the matter of fact; and that with respect to the matters of law, of which it may involve the discussion, they are less distinctly and less satisfactorily decided upon the motion for a new trial, than when raised by special pleading, and so brought before the court in the first instance, by way of demurrer, for determination.

“ But these considerations give an inadequate idea of the extent of the inconvenience now produced by the great and growing frequency of the motions in question. Indeed we know of no existing abuse of which the influence is so wide, and the pressure so intolerable. They have, in a considerable degree, impaired the value of a verdict, which, according to the ancient and true principle of law, was of a final and conclusive character, but is now in so many instances subjected to the revision of the court in *banc*, and

with so much facility set aside, that the party in whose favour the opinion of the jury is declared, has comparatively little reason to rely on the permanency of the advantage he has obtained. He too often finds that it is but one successful struggle in an arduous and expensive contest, which is to end at last in defeat. But an effect still more serious is the enormous extent to which this branch of practice has encroached upon those portions of the public time properly destined to other employment. As an illustration of this, we may refer to returns received from the King's Bench and Common Pleas, by which it appears that in Michaelmas Term, 1829, ninety-nine motions for new trials were made in the former court, and * forty-nine in the latter; that in the [*lxiv] King's Bench rules nisi were granted upon fifty-three of these applications, and not more than four rules for new trials ultimately disposed of in the course of the term; and that in the Common Pleas there were thirty-nine rules nisi granted, of which ten only were disposed of. To such accumulations, addition of course is made in each succeeding term; and were it not for the assistance obtained from the sitting of the three judges out of term (a jurisdiction which in other respects has appeared to us objectionable, and to require abolition), (f) the result, as far as regards the Court of King's Bench, would be a total obstruction of the current of ordinary business, by the growing masses of arrears upon motions for new trials. The tendency of the general issue to give occasion for such applications we have already attempted to explain; and we have no hesitation, therefore, in attributing to the use of that plea, the far greater part of the evils to which we have thought it our duty to advert, as connected with motions of that description. We think, too, that its disuse would supply the only practicable and effective remedy.

“Other inconveniences, though certainly of less moment, result from that method of pleading. It often happens that points of law arising at the trial, receive no decision from the judge, but are reserved by him for the opinion of the court in *banc*; or with a view to a more distinct and solemn argument before that court, the facts proved are thrown by consent of parties into the form of a special case. Neither of these methods is comparable, in point of certainty, of despatch, or of cheapness, with that which is

(f) It was afterwards abolished by 11 Geo. IV. and 1 Will. IV. c. 70, s. 5.

[*lxv] afforded by demurrer; and their substitution * for the latter, operates like the motion for a new trial, though in a less degree, to the prejudice of both the parties, and to the delay of public business.

“In comparison with these disadvantages resulting from the general issue, the inconveniences of special pleading are insignificant. It is found difficult, no doubt, to set forth the matter of defence or reply, in a form which shall be at once sufficient in point of law, and accurate in point of fact; and the occasional consequence of this difficulty is, the defeat of the party, upon formal defects not connected with the justice of the case. But this evil is not, like those arising from the general issue, either of ordinary occurrence or inevitable in its nature. It may in general be averted by the diligence and skill of the pleader, and is materially alleviated by the practice of allowing amendments upon demurrers. It is also true that special pleading tends to prolixity of statement on the record, which is a source of expense to the suitor; but that expense bears no proportion to the vast increase of costs resulting from the adoption of the general issue. It seems to be commonly supposed, that it is in the length of the pleadings and the correspondent amount of office fees, or fees to pleaders or counsel payable upon them, that the expense of an action at law chiefly consists. But this is a great mistake, and one that it is very important to correct. By far the heaviest items in the bill of costs are those which relate to the proofs, and more particularly to the conveying of witnesses to the assises, and maintaining them there; and next to these, the most costly charges arise from the transaction of any kind of business in open court, upon motion; the fees upon pleading being (comparatively speaking) upon a petty scale. In illustration of this, we may refer to the bills of costs contained in the Appendix to our First Report. It may easily be conceived, therefore, that the general issue, from its tendency [*lxvi] * to an unnecessary accumulation of evidence, and to motions for new trials, must often ultimately lead to a much greater expense than could have been produced by any probable prolixity in special pleading. The preference due to the latter method will become still more evident, when it shall be cleared, by such regulations as we have suggested in other parts of this Report, and hope hereafter to suggest, from some of its principal inconveniences and abuses, more particularly from those which relate to the variety and prolixity of counts and pleas, and the

doctrine of variance. (g) On the whole, therefore, we entertain no doubt of the expediency of making such alterations in the existing practice as will introduce special pleas in almost every case, and in some actions abolish altogether the use of the general issue."

NOTE 38. See * p. 207.

Our earliest records present many instances of what may be considered as special traverse in a crude and imperfect form. As these tend to illustrate the origin and meaning of the regular formula afterwards adopted, and confirm the views taken in the text, of the reasons and manner of its introduction, a few specimens shall here be inserted.

In an assise of mortancestor, the tenant pleads *quod terra illa pertinet ad ecclesiam suam, quam habet ex dono Regis Ricardi, et ecclesia inde est seisita, &c.* The plaintiff then denies the seisin of the church, in this form: — *Robertus dicit quod pater suus inde fuit seisitus in dominico suo, die qua Rex Ricardus illam ecclesiam dedit * prædicto Herberto; ita quod ecclesia illa [* lxvii] tunc non fuit seisita, nisi de serviciis illius terræ. (h)*

In trespass for entering the plaintiff's court, and taking away his ward, John, the defendants deny the trespass, but add an explanation: — *dicunt quod curiam prædictam non ingressi fuerunt, nec prædictum Johannem ibi ceperunt, &c.* Sed verum volunt dicere; *quod ipsi fuerunt versus Oxon, et tunc viderunt prædictum puerum, et puer percepit quod prædicta Isabella (one of the defendants) fuit mater sua, et secutus est eam, usque domum suam, et adhuc moram facit cum eâ; sed ipsi eum non duxerunt. &c. (i)* On the circumstances so disclosed, the court decide, that the defendants, in point of law, are guilty of taking away the ward.

In trespass for fishing in the plaintiff's libera piscaria, the defendants, instead of generally denying the trespass, plead that they fished there, as in a fishery where their ancestors and themselves had fished, as of their common of fishery, — *et non in propriâ piscariâ et liberâ ipsius Nicholai. (k)*

(g) Regulation has since been made on both these subjects, vide *suprà*, * pp. 95, 313.

(h) *Plac. Ab. 44; Staff. rot. (temp. Johan.)*

(i) *Plac. Ab. 134; Berk. rot. 163 (temp. Hen. III.)*

(k) *Plac. Ab. 136; Buck. (temp. Hen. III.)*

NOTE 39. See * p. 208.

The principle on which the *absque hoc* was introduced, is well illustrated by the following case from the Year-books. In a writ of account brought against a woman, as guardian in socage, she pleaded, "that the ancestor of the infant held of the defendant, by service of chivalry, and that, therefore, she took the infant as guardian in chivalry;" and prayed judgment. To this it [* lxviii] was objected, * "That is no plea, unless you go on to say, *without that, this he held in socage*: for your plea at present is merely *argumentative*." The plea was then proposed in this form, — "He held the land of us by service of chivalry — *without this, that we occupy the land as guardians in socage*." To which it was objected, "Your plea is still no plea; you ought to say, *Without this, that he held in socage*; — for though the defendant occupy the land as in her own right, she shall still be charged, under these circumstances, as guardian in socage." — On this the defendant took the following issue, "*that he held by service of chivalry, without this, that he held in socage*." (l)

With respect to the *wording* of this formula, *absque hoc quod*, it may be observed, that *absque hoc quod*, and *sine hoc quod* (in the record), and *sans ceo que* (in the *viva voce* pleading), were used as common terms of denial, at a very early period. Thus, as early as the fifteenth year of John, we find the phrase, *sine hoc quod*, so occurring in the *Placitorum Abbreviatio*. (m) They were not, however, originally appropriate (as the parallel English words, "*without this, that*," now are), to the case of a *special* traverse; for they were sometimes used where the denial was not of that kind; and on the other hand, in cases of *special* traverse, we sometimes find a substitution of other synonymous expressions, such as *et non*. (n)

NOTE 40. See * p. 233.

Color a rhetoribus appellatur, probabilis alicujus rei causa, quæ quod falsum aut turpe est, velamus. (o)

[* lxix] * And the following passage in Juvenal will readily recur to the reader's recollection: —

(l) 10 Hen. VI. 7.

(m) Plac. Ab. 90; Ebor. rot. (temp. Johan.)

(n) Plac. Ab. 186; Buck. cited *supra*, * p. lxvii.

(o) Turneb. in notis ad Quintil.

Quis *color*, et quod sit causæ genus, atque ubi summa
 Quæstio, quæ veniant diversa parte sagittæ,
 Scire volunt omnes; mercedem solvere nemo. (p)

See the observations formerly made on the degree of connection which the method of pleading seems to have with the rules of the ancient logic and rhetoric, *suprà*, NOTE 23.

NOTE 41. See * p. 233.

The same quality of admitting an apparent right in the opposite party, belonged to the pleadings in the Roman law. Interdum evenit ut exceptio quæ *primâ facie justa* videtur, tamen inique noceat; quod cum accidit, alia allegatione opus est, adjuvandi actoris gratia, — quæ replicatio vocatur; quia per eam replicatur, atque resolvitur jus exceptionis. Rursus interdum evenit, ut replicatio quæ *primâ facie justa* est, inique noceat — quod cum accidit, aliâ allegatione opus est, adjuvandi rei gratia, quæ duplicatio vocatur. Et si rursus ea *primâ facie justa* videtur, sed propter aliquam causam, actori inique noceat, rursus aliâ allegatione opus est, quâ actor adjuvetur; quæ dicitur triplicatio. (q)

NOTE 42. See * p. 244.

The reason of the fiction of *colour*, is, in some measure, explained in Doct. and Stud. 271, and Leyfield's case, 10 Co. 89 b.; and the explanation, as far as it goes, is conformable with the account given in the text. It will be * observed, [* lxx] that in many books colour is said to be necessary, in a view *to prevent the plea from amounting to the general issue*. It will, however, appear in a subsequent part of this work, (r) that this is, in fact, only an imperfect way of expressing the same doctrine that is laid down in the text.

It should also be observed, that Mr. Reeves assigns, as a *motive*, with the ancient pleaders, in giving colour, and, indeed, as the secret origin of the practice, the wish to interpose *delay*, by preventing the more summary decision which the general issue would produce. (s)

(p) Juv. Sat. vii.

(r) See * p. 462.

(q) Inst. lib. iv. tit. xiv.

(s) See 3 Reeves, 24.

NOTE 43. See * p. 249.

This important rule, — that every pleading is taken to “admit such traversable matters alleged on the other side, as it does not traverse,” appears not to have existed in the *civil law*. “Non utique existimatur confiteri de intentione, adversarius quo cum agitur, quia exceptione utitur.” (t) — “Non ad effectum exceptionis pertinet, quod reus excipiens, hoc ipso fateri videretur de intentione actoris.” (u) On the other hand, we find it established in the practice of the courts of Normandy. For it is laid down, in the *Commentaires de Terrien*, — Quand les parties procedent, l’un afferme faicts — si la partie contre qui les faicts sont affermez, n’en donne neance, les faicts affermez demeurent pour confessez. (x) And it may be observed here, that the analogous principle of holding a demurrer to admit matters of fact, also prevailed in the Norman law. Thus it is laid down in the same work, — Il est defendu de dire je denie vostre faict, et neantmoins je le defens; qui [* lxxi] est a dire * que quand prouvé seroit, je le soustiens impertinent. Et se faut arrester à l’une des fins (that is, the party must make his election of one of these *issues*), c’est à dire, ou à le nier (au quel cas s’il est prouvé, encores qu’il soit impertinent, le prouvant gaigne sa cause), ou à le defendre et soustenir qu’il est impertinent, et n’inferre la conclusion du demandeur (au quel cas le faict demeure pour connu), ou à soustenir que le faict qu’on afferme au contraire, est plus pertinent. Au quel cas aussi les faicts demeurent pour connus d’une part et d’autre; et s’assiet le jugement de droict sur la pertinence ou impertinence des dits faicts. (y)

NOTE 44. See * p. 257.

It is to be observed, that if the plaintiff has named his close in the declaration, the plea of freehold does not drive him to new assign, though the defendant may have another close of the same name in the same parish, unless at least the defendant in his plea describes his close by its abutments. *Cocker v. Compton*, 1 Barn. & Cress. 489. And see *Lethbridge v. Winter*, 2 Bing. 49. *Cooke v. Jackson*, 9 Dowl. & Ry. 495. *Lempriere v. Humphrey*, 3 Ad. & El.

(t) Dig. lib. 44, tit. 1, s. 19.

(u) Voet. ad Pandectas.

(x) *Commentaires de Terrien*, 1664, liv. ix. ch. xxvii.

(y) Ibid.

181. And on the subject of the common bar generally, see 1 Wms. Saund. 299 b., note (5). *Lambert v. Stroother*, Willes, 218. *Martin v. Kesterton*, 2 W. Bla. 1089. *Hawke v. Bacon*, 2 Taunt. 156. *Tapley v. Wainwright*, 5 Barn. & Adol. 395. Since the recent rule of court, however (Hil. T. 4 Will. IV.), by which the plaintiff is bound to designate the close or place in the declaration by name or abutments, or other description, the common bar and new assignment thereon are likely to be of rare occurrence.

* NOTE 45. See * p. 301.

[* lxxii]

The rule against double pleading (peculiar at the present day, it is believed, to our own country,) is not referable to the sources of the civil or canon law,—in both of which the defendant was allowed to use as many exceptions as he pleased. (z) Nor has its origin been hitherto traced. It may not, therefore, be unacceptable to the reader to be informed, that this rule, to a certain extent, at least, very anciently obtained among the pleaders in Normandy, and was considered as a peculiarity in their plan of allegation. In the *Commentaires de Terrien*, we find the following passage:—En Normandie l'en ne plaide qu'à une fin, &c. (i. e. a single issue). And afterwards — De la regle dessus dite qu'on ne plaide qu'à une fin, s'ensuit, que combien que de disposition de Droit (i. e. of the civil law) nullus pluribus defensionibus uti prohibeatur, toutesfois cette regle souffre limitation par nostre usage et pratique, en ce qu'on ne peut user de defense de fait dénié, et de fait défendu., (a) &c., that is, a party cannot, at once, plead and demur to the same matter.

After the proofs given in some of the preceding notes, of the derivation of so much of our judicial system from that of our continental neighbours, the reader will, perhaps, have no difficulty in adjusting between the two nations, the priority of claim to the regulation now in question.

* It is further observable, that this rule seems to have [* lxxiii]

(z) Qui excipit, non propterea confitetur agentis intentionem, cum eidem non solum unam, sed et plures exceptiones etiam contrarias, proponere liceat: quas, si legitimæ fuerint, si juex non admiserit, potest appellari; judex vero punitur. Corv. Jus Canon. lib. iii. 3, tit. 32. Pluribus defensionibus uti permittitur. Dig. lib. 44, tit. 1, s. 5. Nemo prohibetur pluribus exceptionibus uti, quamvis diversæ sunt. Ibid. s. 8.

(a) Comment. de Terrien, liv. ix. xxvii.

been unknown in England (at least not observed in practice), up to the date of Bracton's treatise, for it is not mentioned in the work of Glanville; and during the whole interval between these two authors, the *Placitorum Abbreviatio* abounds with instances of the use of several pleas to the same matter. (*b*)

So far with respect to the *origin* of this rule. With respect to its *principle*, or *object*, it was that of avoiding *several issues*. Thus, in the first year of Edw. II., the Court interrupt the pleader with this remark, — Vous dites chose que veot avoir deux issues — tenez vous al une. (*c*) So, in the same year, a similar admonition occurs. Il covient que vous tenez al une, qor chescun de eux prent diverse issue. (*d*) Again, in the reign of Edw. III., one of the judges asks, — Si jeo port un assise devers vous, et vous dites que vous n'aves rien sinon a terme d'ans, et puis dites ouster que la terre est auncien demesne, averes vous cestes deux plees? quasi diceret non: et la cause est pur ceo que deux issues purroient estre pris sur les plees. (*e*)

As for the reason why several issues were thus avoided by the early pleaders, it was, no doubt, the wish to abbreviate and simplify, as much as possible, the process of the legal contention.

While the explanation of the rule appears to be thus simple, it is not easy to account for the fantastic illustration of its meaning, given by Bracton, as cited in a former note. (*f*) Indeed, it may be observed, that the reasons offered for it by later writers, [* lxxiv] though less quaint, are not quite * satisfactory. Thus it is said, in Bacon's Abridgment: (*g*) "The reasons why duplicity in pleading is a fault, are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas, the party pleading such double matter must be presumed conscious of his own strength, and therefore ought to put his defence on that single point, which will put an end to it. Besides, the jury ought not to be charged with a multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the

(*b*) See *Plac. Ab.* 8, *Hertf. rot.* 26; 9 *Suff. rot.* 22; 48 *Linc. rot.* 7; 50 *Buck. rot.* 2; 88 *Sussex. rot.* 22; 92 *Linc. rot.* 14; vide *suprà*, NOTE 28.

(*c*) 1 *Edw. II.* 14.

(*d*) *Ibid.* 8.

(*e*) 40 *Edw. III.* 45.

(*f*) See NOTE 28.

(*g*) *Bac. Ab. Pleas, &c.* (K. 1).

severity of an attainr."—Another writer gives as the reason, why a party is confined to one matter of defence, "that the twelve men are commonly rude and ignorant; and so, consequently, not proper to be troubled with too many things at once." (*h*)

NOTE 46. See * p 302.

On this point of practice, viz. the joinder of different demands in the same action, it may be worth remark, that the canon law differed from the imperial institutions.

Plures actiones, says Voet, (quoting the Digest,) uno libello cumulari nequeunt. . . . Sed usu hodierno invaluit, plures uno libello actiones cumulari posse, ex Juris Canonici dispositione, quoties ex diversis causis, ad diversa tendentibus, agitur. . . . Cavendum tamen, ne tales cumulentur quæ sibi invicem contrariæ sunt. . . . Non etiam * cumulatæ plures actiones [* lxxv] ex eadem causa, et ad idem tendentes, veluti actio ex testamento, et rei vindicatio, ad consequendam eandem rem legatam, eo quod altera intentata, alteram perimit. Nec plures actiones contra diversos, ex diversis causis, debitores, &c. (*i*)

The English courts, it will be observed, have adopted the same rule with the Canonists: but whether by derivation from them, or from some other source, does not appear.

NOTE 47. See * p. 302.

Count is also used (in a real action) as the name for the *whole declaration*. It is from the French *conte* (narrative); and it is worth notice, that in the law of Normandy, this word *conte* had a more extensive meaning, and one, therefore, more conformable to its popular and original sense of *narrative*, than those which it now bears in the English law; being applied to *any* of the allegations of fact in the cause, at whatever part of the pleading it might occur. In the *Commentaires de Terrien* is cited an ordinance, under date A. D. 1462 and 1497, in the following terms:—La Court a ordonné et ordonne que dorenavant apres que les parties auront esté ouys verbalement en leurs raisons et conclusions, et escrit en *propos, response, replique* et *duplique* (es quels quatre *contes*, les dites parties seront tenues mettre et escrire tous leurs faicts, neances,

(*h*) Smith, *Repub. Ang. lib. 2, c. 13, p. 57*, cited in *System of Pleading*, p. 197.

(*i*) Voet. *ad Pandectas*, lib. ii. tit. xiii. sect. 14.

offres, et raisons, et faire production de toutes leurs escritures quils seront tenües dater et produire), les dites parties pourront, outre la duplique, mettre et eslire leurs conclusions en deux petits *contes*, &c. (*k*)

[* lxxvi] * The observation of Craig, that the terms of art in the English law are all derived from the French tongue, and have no affinity with the Saxon, has been already cited. (*l*)

And perhaps when the reader considers how many proofs have been afforded in the preceding notes, of the derivation not only of our legal *language*, but of our *forensic usages*, from the same source, he will be inclined to accede (with certain qualifications) to another still broader position of the same author. Certum est jus omne, quo Angli hodie utuntur, a Normannis, seu potius a Gallis, ad eos emanasse. (*m*) That our system of *pleading*, at least, was borrowed from the Normans, with some early and slight admixture of the principles of the civil and canon law, there seems the strongest reason to believe.

NOTE 48. See p. 313.

The rules of Hilary Term, 4 Will. IV., upon the subject of several counts and pleas, are as follows:—

“And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the act of 3 & 4 Will. IV. c. 42, sect. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged.

“Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or recognisances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

[* lxxvii] * “Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed: *ex. gr.*

(*k*) Comment. de Terrien, liv. ix. c. xxvii.

(*l*) Vide *suprà*, NOTE 24.

(*m*) Crag. Jus Feud. lib. i. d. 7.

counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

“So counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

“So counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed.

“But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note, in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts, and such counts are to be allowed.

“Two counts upon the same policy of insurance are not to be allowed.

“But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

“Two counts on the same charter-party are not to be allowed.

“But a count for freight upon a charter-party, and for freight *pro ratâ itineris* upon a contract implied by law, are to be allowed.

“Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed.

“In actions of tort for misfeasance, several counts for the * same injury, varying the description of it, are [* lxxviii] not to be allowed.

“In the like actions for nonfeasance, several counts founded on various statements of the same duty are not to be allowed.

“Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

“Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters — *ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though

one promise to pay, only, is alleged, in consideration of all the debts.

“ Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

“ The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one, of the same contract, in the same count.

“ Pleas, avowries, and cognisances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule,) are not to be allowed.

“ *Ex. gr.* pleas of solvit ad diem, and of solvit post diem, are both pleas of payment, varied in the circumstances of time only, and are not to be allowed.

“ But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

[* lxxix] * “ Pleas of an agreement to accept the security of *A. B.* in discharge to the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed.

“ But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct, for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

“ In trespass quare clausum fregit, pleas of soil and freehold of the defendant, in the locus in quo, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

“ But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

“ So pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

“ Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

“But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

“The examples in this and other places specified, are given as some instances only of the application of the rules to which they relate, but the principles contained in the rules are not to be considered as restricted by the examples specified.

“Where more than one count, plea, avowry, or cognisance shall have been used, in apparent violation of the *preceding rule, the opposite party shall be at liberty [*lxxx] to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognisances, are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule, be struck out at the cost of the party pleading, whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is bonâ fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognisances mentioned in such application, which shall be allowed.

“Upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognisance, which he shall have so failed to establish, and he shall be liable to the other party for all costs occasioned by such count, plea, avowry, or cognisance, including those of the evidence as well as those of the pleading; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognisance, allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was bonâ fide intended to be established at the trial, in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance so *allowed, [*lxxxi] if the court or judge before whom the trial is had shall be

of opinion that no such distinct subject-matter of complaint was bonâ fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognisance, with respect to which the judge shall so certify." (n)

The nature and extent of the inconvenience resulting from the state of the law, antecedent to these Rules, may be collected from the following remarks of the Common Law Commissioners.

"The multiplication of counts and pleas has long been considered as one of the chief abuses in the system of pleading. Though in other respects the prolixity of allegation once prevalent has been materially retrenched, this particular kind of redundancy has never, perhaps, prevailed more remarkably than at the present day. Records, containing from ten to fifteen special counts or pleas, are by no means rare, and fail to excite remark. Of these the greater proportion, and frequently the whole, relate to the same substantial cause of action or defence. They are merely different expositions of the same case, and expositions of it often inconsistent with each other. The practice is productive of great

and various inconveniences; one of the most obvious is, [* lxxxii] its tendency to * increase the expense of litigation. The length of a count or plea is very uncertain, but cannot be stated, on an average, at less than four law folios, and at that length, the addition of each count or plea is an addition of four shillings to the taxed costs on the draft. The increased expense is also to be taken into the account, which attends the making of copies to be kept and sent into the country, the making up of the issue, the paper books, the engrossments on parchment and court fees thereon, and the necessary increase in the length of the brief, and the amount of fees to counsel. There are other consequences, however, of the practice, even more injurious in our opinion, than its effects on the bill of costs. It often leads to such bulky and intricate combinations of statement, as to present the case to the

(n) For the operation of this rule see *Head v. Baldrey*, 11 A. & E. 906. *Dewar v. Swabey*, *ibid.* 913.

judge and jury, in a form of considerable complexity: and it is apt, therefore, to embarrass and protract the trial, and occasionally leads to ultimate confusion and mistake in the administration of justice. The inconvenience last mentioned is more particularly felt, when, to a declaration consisting of various counts, the pleading happens to be *special*; for in that case, the pleas also, like the counts to which they are pleaded, are often framed in various forms; and the intricacy of the whole record is proportionably increased. The practice, therefore, of multiplying counts and pleas, presents one of the greatest obstacles to a more extended use of special pleading, a system, the great advantage of which we shall have occasion, in the course of this Report, to explain and enforce.

“The practice in question appears at first sight, no less strange than objectionable. To allow the plaintiff or defendant to state his case in ten or fifteen different ways, more especially if the statements be inconsistent, is a custom, the reasonableness of which is not readily perceived, which is peculiar, perhaps, to our own system of judicature, * and which seems to [* lxxxiii] have been unknown, even in that system, at a former period. With respect to pleas, indeed, it is certain that the practice is not older than the 4th Anne, c. 16, and though it has been of much longer duration, with respect to counts, yet the precedents from the time of Queen Elizabeth to that of King William and Queen Mary show, that in the use of several counts, the pleader was at that period incomparably more sparing than at present; and the still existing rule, which requires each count always to set forth a cause of action ostensibly different from the preceding (even when in fact the same), combines with other reasons in support of the opinion, that, at an antecedent era, one count only upon each cause of action was allowed. The present variety of statement, however, is not without sufficient motive, nor is its abolition, or reform, a task without difficulty. In some degree, that variety may, no doubt, be attributed to the increased remuneration which the pleader or attorney obtains by lengthening the draft; but it is mainly founded on reasons of a more honest and a more cogent kind. The principal of these is the state of the law on the subject of *variance*.

“At the trial of the cause, a material variance between the allegation in the pleading, and the state of facts proved, is a fatal objection, and decides the suit in favour of the objecting party;

and a variance is often considered in this technical sense as material, though to common sense it may appear to be very trifling, and though it may be wholly irrelevant to the merits of the case.

“Thus in an action for a false charge of felony, where the declaration stated that the defendant went before Richard Caven-dish, Baron Waterpark of Waterfork, a justice of the peace, and falsely charged the plaintiff with the felony, and it appeared in evidence that the charge was made before Richard Caven-[*lxxxiv] dish, Baron Waterpark of Waterpark, this * variance was considered as fatal, and the plaintiff was nonsuited. So in a case where the plaintiff brought his action on the warranty of a horse, stating the warranty to be that the horse was sound, and it appeared upon the proof that the warranty was that the horse was sound except for a kick on one of his legs, this was also held to be a ground of nonsuit, though the unsoundness which was proved, and for which the action was brought, had no relation to the leg. In another case, where the plaintiff brought his action on a contract to deliver goods, though he took the precaution of stating it in two different ways, viz. in one count, as a contract to deliver within fourteen days, and in another, as a contract to deliver on the arrival of a certain ship, yet he was nonsuited, because at the trial it was proved to be a contract in the alternative, viz. to deliver within fourteen days, or on the arrival of the ship; and he had no count stating it in the alternative. The cause of action, however, was the non-delivery of the goods after the expiration of the four-teen days, and also after the arrival of the vessel, so that the variance was wholly immaterial to the real merits of the case. This kind of objection is naturally looked out for, by a party whose case has no foundation on the merits, and is consequently of very frequent occurrence; so that, notwithstanding the protec-tion from it, afforded (as will presently be explained) by the use of several counts and pleas, it is one of the most frequent sources of miscarriage in the suit.

* * * * *

“It is by way of guard, therefore, against such perils, that the practice has been gradually introduced of varying the state-ment in different counts or pleas, so as to meet, by anticipation, every possible variety in the proof, and, in the event of a variance arising with respect to one count or plea, to be pro-vided with another, to which the evidence may more accurately

apply. Such at least is the known use and *application [* lxxxv] of the method, and it is expressly laid down by the earliest authority which we have been able to find, that such was its reason and origin.

“The method being once established, the resort to it was soon carried, for an obvious reason, far beyond the strict necessity of the case. For the power of thus guarding against variance has naturally led the attorney to be less careful and precise than he otherwise would have been, in the preliminary investigation of facts, and in the statement of them laid before his pleader; and, instead of applying himself to the vigilant performance of these duties, he has taken the more convenient course of leaving the state of facts in a great measure unascertained, and increasing, in a proportionate degree, the variety of his counts or pleas.”

NOTE 49. See *p. 319.

Such was the general state of the law on the subject of venue; but many nice questions arose as to the place from which the venue should come in particular cases. This appears to have been a matter in some measure in the discretion of the court; and we accordingly find the judges, in some cases, departing from the ordinary course, and directing the venue to come, not from the place where the matter in issue arose, but where the action was laid;—or to come from more counties than one, or from different places in the same county. (n) In one case, in consequence of doubts that had arisen whence the venue should come, upon a plea of *villinage*, it appears that the judges suspended the issuing of the venire, till they had consulted Parliament, whether the venue should be of the county where the villinage was alleged, or where the writ was brought. (o)

* NOTE 50. See *p. 320.

[* lxxxvi]

Lord Coke says, that by the *common law*, *four* of the hundred were required in actions, real, mixed, and personal. (p) He probably by this expression means only the law, as anterior to the statute, which altered the number in personal actions to *two* (viz.

(n) Plac. Ab. Suff. 67; 86 Bedf. rot. 7; 94 Northumb. rot. 4; 95 Bedf. rot. 2; 3 Reeves, 107–112.

(o) 3 Reeves, 108.

(p) Co. Litt. 157 a.

27 Eliz. c. 6) ; for it seems clear, that by the *common law* (if that phrase be understood the state of law anterior to any of our existing statutes), the jury was to consist wholly of persons from the *immediate venue* ; and neither four, nor any other number of mere *hundredors*, would suffice. Indeed the form of the venire facias, as it existed even down to the time of Elizabeth, and later, is alone sufficient to prove this. Præcipimus, &c., quod venire facias, &c., 12 liberos et legales homines *de vicineto de B.*, &c. (q) The law, with its usual adherence to old usages, retained this form of direction to the sheriff, though in fact his duty had, at the time of that statute, long been confined to summoning some of the jurors from the *hundred* only in which *B.* was situate, and the remainder from the *county at large* ; but the form serves to show the nature of the more ancient practice upon which it had been originally framed.

The same point is yet more distinctly proved by the rule, that has been always recognised, that a *hundred is not a sufficient venue to lay in the pleading* ; (r) — a rule that seems quite inconsistent with the supposition, that a summons of hundredors only was originally sufficient.

[*lxxxvii]

* NOTE 51. See *p. 324.

Lord Coke seems to hold, that this distinction between local and transitory matters, and the maxim by which it is expressed — *debitum, et contractus, &c. sunt nullius loci*, — prevailed at the *common law*. (s) Yet it is difficult to conceive this to have been the case, when the character of the original institution of trial by jury is considered ; because the practice of observing the true venue, in transitory as well as local matters, seems necessarily consequent upon the nature of that institution, according to its most ancient form — that is, when the jurors consisted of persons cognisant of the fact, on their own knowledge. (t) Perhaps the expressions of Lord Coke, when fairly construed, do not mean more than to trace the prevalence of this distinction to a *very early period*, and are not to be taken as declaring the original state of the law on this point.

It is to be observed, that Lord C. B. Gilbert lays down on this

(q) 27 Eliz. c. 6.

(r) Co. Litt. by Harg. 125 a., n. (1).

(s) Bulwer's case, 7 Rep. 3 a. ; and see 1 Saund. 74, n. (2).

(t) See NOTE 38.

subject, propositions strongly confirmatory of the view taken in this work, and irreconcilable with the supposed doctrine of Lord Coke, — if that doctrine be understood to imply an *original* distinction between local and transitory matters. “The venire was to bring up the *pares* of the place where the fact was laid, in order to try the issue; and originally *every* fact was laid in the place where it was really done; and therefore the written *contracts* bore date at a certain place,” &c. (u)

NOTE 52. See * p. 326.

It has been said, that the practice of changing the venue * rests on the equity of the statute 6 Ric. II. [* lxxxviii] stat. 1, c. 2. (x) On examination, however, of that statute, this doctrine will be found to be attended with great difficulties; and if the view taken in the last note be a correct one, the practice of changing the venue may be more simply and satisfactorily referred to the ancient principle of the common law, requiring the jurors, in all cases, to be summoned from the true neighbourhood.

NOTE 53. See * p. 334.

Though in some of the preceding examples, *the judgment was arrested after verdict*, on the ground of the omission of quality, quantity, or value, yet it must be observed, that the objection is now rarely perhaps available at *that stage of the cause*. For in many cases the fault would no doubt be considered as aided by the effect of the verdict itself. Thus, if the jury find a certain amount of debt or damage to be due, it appears to supersede any farther consideration of the quality, quantity, or value of those goods and chattels, in respect of which the amount of the claim is thus liquidated. And even when the verdict has itself no healing operation of this kind, the statutes of jeofails, which, after verdict, cure all defects of mere form, would probably be held, in many instances, to remove the objection. The courts formerly, indeed, entertained another view on this subject; holding the omission of quality, quantity, or value, to be matter not of form, but of substance, (y) and therefore not capable of being cured by the statutes of jeofails then

(u) Gilb. Hist. C. P. 84.

(x) Vide 1 Saund. 74, n. (2). *Santler v. Heard*, 2 Bla. Rep. 1033.

(y) *Playter's case*, 5 Rep. 34 b.

in force ; but the more liberal doctrines of the modern pleading, or the wider effect of the subsequent statutes of jeofails, [*lxxxix] * seem to have relaxed this severity. Accordingly, it has been the tendency of recent authorities to consider objections of this kind as immaterial *after verdict*. Thus, in *assumpsit*, the declaration stated, that in consideration that the plaintiff had sold to the defendant, a *certain horse* of the plaintiff's, at and for a *certain quantity of oil* to be delivered *within a certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly ; though neither value, quantity, nor time was specified, yet the court held that the objections thence arising could not prevail *after verdict*. (z) However, it seems that there are some instances in which the fault is still considered as matter of substance, and ground for arresting or reversing the judgment after verdict ; as in the case of *replevin* cited in the text, (a) where the declaration did not set forth the nature, number or value of the goods.

When an omission of this kind is considered as mere form, so as to be cured by the statutes of jeofails, it will be so cured, not only *after verdict*, but also after judgment by *confession*, *nil dicit*, or *non sum informatus* ; and, if made the subject of demurrer, the demurrer must be *special*. (b)

NOTE 54. See * p. 387.

Though the rule, prescribing the specification of quality, quantity, and value, has been here classed as tending to the *certainty of the issue*, the author is aware that, according to some authorities, these particulars are required in another view, viz. the more [*xc] certain information of the opposite party, * of the nature of the demand against him, in order to enable him to plead to it more precisely. But though this object may have been sometimes contemplated as an additional ground for enforcing the specification of quality, quantity, and value, the author conceives that particularity on these points was originally and mainly required in reference to the same general design, which forms the basis of all the rules with respect to certainty, viz. the production of a *certain issue* ; and that this subject, therefore, occupies its right place in the treatise.

(z) *Ward v. Harris*, 2 Bos. & Pul. 265.

(a) *Pope v. Tillman*, 7 Taunt. 642.

(b) As to special demurrer, vide *suprà*, * pp. 49, 50, 151.

That to produce *certainty in the issue* is the general design, both of this and all the other rules that enforce certainty in the *pleadings*, may not only be inferred from the reason of the thing, but distinctly proved by several authorities. Thus Bracton lays it down — *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.*(c) So, in treating of an assise of novel disseisin of common of pasture, and of the form of intentio or count, he says, *oportet docere de qualitate pasturæ, utrum sit larga vel stricta, ut certa res deducatur in judicium.* Item de quo tenemento pertineat, et ad quale tenementum. Et eodem modo de *tempore, genere, numero, et modo* (d) &c. And the same doctrine is laid down still more decisively in the following passage. *Oportet quod petens rem designet, quam petit; videlicet, qualitatem, ut sciatur utrum petatur terra vel redditus, cum pertinentiis; — item quantitatem, utrum, videlicet, sit plus vel minus, quod petitur. Certam enim rem oportet deducere in judicium, ne contingat judicium esse delusorium vel obscurum, quia de re incertâ in judicium deductâ, certa fieri non poterit sententia. . . . Specificare autem poterit, sic, * ut si dicat — Peto versus talem tot [*xc] maneria, quandoque cum pertinentiis, quandoque sine; item tot feoda militum cum pertinentiis; item tot carucas terras, tot virgatas, tot acras, tot selliones, &c.* (e)

Thus, too, it is laid down by Lord Coke, that in pleading performance of the condition of a bond, the party "ought to plead in certainty, the time and place, and manner of the performance, *so as a certain issue may be taken*, &c." (f)

See also *Rex v. Cooke*, 2 Barn. & Cress. 871, a case confirmatory of the same view, and decided since the first publication of this work.

NOTE 55. See * p. 420.

The principle of the rule against a *negative pregnant*, is not clearly or satisfactorily explained in any of the treatises; and, indeed, very little is said in them upon this subject, though the fault itself is in the older cases a frequent ground of objection. That the author has here suggested the true principle, is confirmed, he thinks, by the form in which we find this kind of objection taken in the following case from the Year-books: — In an action for negligently keeping a fire, by which the plaintiff's houses were burnt,

(c) Cited Co. Litt. 303 a.

(d) Bract. 224 b.

(e) Bract. 431 a.

(f) *Halsey v. Carpenter*, Cro. Jac. 360.

the defendant pleaded that the plaintiff's houses *were not burnt by the defendant's negligence in keeping his fire*; and it was objected that "the traverse was not good, for it *has two intendments*; — one, that the houses were not burnt; the other, that they were burnt, but not by negligent keeping of the fire; and *so it is a negative pregnant*." (g) The same ground, viz. that of am-

[* xcii] biguity, * is taken in the 7th Edw. II. 213, 226, which are believed to be the earliest authorities for the rule itself.

What is to be found in more modern books on this subject, tends to support the same view. Thus we find it laid down: — "Therefore the law refuseth double pleading and negative pregnant, though they be true, because they do *inveigle* and *not settle the judgment upon one point*." (h) So it is said in another book: — "A negative pregnant is, when two matters are put in issue in one plea; and this makes the plea to be naught, because the plaintiff cannot tell in which of these matters to join issue with the defendant, for the uncertainty upon which of the matters the plaintiff doth insist; and so it is not safe for the plaintiff to proceed upon it." (i)

NOTE 56. See * p. 432.

In treating of the observance of established forms of statement, by the ancient pleaders, Mr. Reeves remarks: — "It was impossible that a set form of expression could be designed for every matter that might become the subject of a declaration or plea. But many modes and circumstances of property recurred so often in judicial inquiries, as to obtain apt and stated forms of description and allegation, which were established by long usage; the experience of them having shown them preferable to all others. These, therefore, were adhered to by pleaders; and the nicety with which they were conceived, is a strong mark of the refinement and curiosity with which this part of our law was cultivated." (k)

[* xciii]

* NOTE 57. See * p. 435.

The plea of *coverture*, however, should conclude with a prayer, *quod narratio cassetur*, and not with *responderi non debet*. (l) So in an action against a man as executor, if he plead that he is

(g) 28 Hen. VI. 7.

(h) *Slade v. Drake*, Hob. 295.

(i) *Styles*, Pract. Reg. tit. Negative Pregnant.

(k) 3 Reeves, 463, 464.

(l) 2 Chitty, 6th edit. 717, 718.

administrator, this plea must conclude with *narrator cassetur*, and not with *responderi non debet*. (m) Indeed, it may be remarked generally, that all such matters as not *only* relate to the *person* of the plaintiff or defendant, but also tend to show that the *form of the declaration* is erroneous, should be considered as pleas in abatement *to the declaration*, rather than *the person*, and should, therefore, conclude not with *responderi non debet*, but *narratio cassetur*. It is only such matters as *alienage, excommunication, &c.*, which relate to the person *exclusively*, and show that no form of declaration would be correctly applied, that will be found to have the former conclusion. In Comyns's Digest (n) very numerous instances of pleas in abatement *to the person* are enumerated; but on examining them, they appear for the most part to relate both to the person and the form of the original writ or declaration; and in all such cases we shall find, in conformity with the remark above made, that, though classed by Comyns among pleas in abatement to the person, they conclude with *breve* (or *billa*) *cassetur*, and not *responderi non debet*.

NOTE 58. See * p. 436.

The object of this change is more fully stated in the * following extract from the Second Report of the Common Law Commissioners, p. 32.

"Not only in the mode in which the pleadings are recorded, but in the style in which they are framed, there is much that is in the nature of mere formal entry, and the introduction of which tends needlessly to encumber and lengthen the allegations. Such is, in our opinion, in some instances, the character of those *formal commencements and conclusions* appropriate to almost every pleading. It is not that the different formulæ to which we allude, are in any case without a substantial meaning, for they always serve to mark the character and tendency of the allegation; they afford a test, for example, whether it is in abatement or bar, whether in estoppel or not, and whether intended to apply to the whole, or to part of the demand. But we think that this useful object may be quite as well attained without the insertion of such of the formulæ as are of a familiar and ordinary kind. The general *actionem non, precludi non* and *prayer of judgment* for the debt or damages, are

(m) *Powers v. Cook*, 1 Ld. Raym. 63.

(n) Com. Dig. Abatement, (E.), (F.).

the forms of incomparably the most frequent occurrence, and, as they indicate no peculiarity in the pleading, may well be considered as superfluous. These, therefore, we think, might with advantage be laid aside; it being at the same time declared, that whenever a plea or subsequent pleading on the part of the defendant, begins and ends without this commencement and conclusion, it shall be taken as pleaded in bar of the action generally; and when a replication or subsequent pleading on the part of the plaintiff so begins and ends, it is to be taken as in maintenance of the action generally. But in the rarer cases of pleading to the jurisdiction, in abatement, in estoppel, in bar to the further maintenance, or in answer to part only, we would still retain the present commencements and conclusions, as tending usefully to mark the character of the pleading.

[* xcv]

* NOTE 59. See * p. 444.

Some of these formal commencements and conclusions are of great antiquity. Thus in Britton (the first law treatise in French, supposed to be written in the reign of Edward I.), (o) we find this form of commencement — *le pleintife ne puerra rien conquere*, (p) — which is nearly the same with *actio. non*. We also find the following, *l'escript ne luy doit grever*. (q) This is the *onerari non*; which is a form of commencement still substituted in some few cases for *actio. non*. So the *prayer of judgment* at the conclusion of pleadings, is mentioned in Bracton. (r)

A somewhat curious circumstance, and one that seems to deserve remark, in this place, is, that a form, exactly parallel to that last cited from Britton, is to be found in the still extant pleadings of the *Lombards*. Thus — *Ipsa chartula non mihi nocet, quia eram Longobarda — non potui facere sine parentibus*. (s) And again, — *si appellator dixerit, Ecce charta quam pater tuus mihi fecit, — et appellatus dixerit, Illa charta nihil mihi impedit, quia pater meus fecit eam per virtutem* (i. e. vim — approbet, &c.). (t)

NOTE 60. See * p. 446.

It is said in several books, that if a plea which contains matter in bar, conclude in abatement, it is a plea in bar, notwithstanding

(o) 2 Reeves, 280.

(p) Brit. c. 96.

(q) Ibid. c. 28.

(r) Bract. 57 b.

(s) Leges Liutpr. lib. vi. 74.

(t) Legis Ottonis ii. Augusti, c. 5.

ing the conclusion. (u) If this proposition be meant to include the case where there is not only *a conclusion, [*xcvi] but a commencement as in abatement, it is opposed to the decision in 6 Taunt. 587, as cited in the text. And even if it be intended to apply only to the case where there is a conclusion in abatement, but no commencement either way, the soundness of the doctrine seems doubtful. For it is said to be founded on this principle, that where there is no cause of action, the plaintiff can have no writ; (x) and the opinions of Prisot, J., and Littleton, J., are cited to this point from the Year-books. It is observable, however, that this principle would only tend to show that such a plea would be a good plea in abatement, and does not explain why it should be considered as a plea in bar. And though Prisot, J., in 37 Hen. VI., 24 a., holds that it would be a plea in bar, the opinion of Littleton, J., 36 Hen. VI., 18, when examined, does not go to that extent. He merely says it would be a *good plea*. There seems reason, therefore, to doubt whether such plea should not be taken (in conformity with the general principle, *conclusio facit placitum*.) as a plea in *abatement*. (y) As to the case where the commencement is one way and the conclusion another, as where the plea commences in bar and concludes in abatement, or commences in abatement and concludes in bar, see 2 Saund. 209 c. n. (1). *Medina v. Stoughton*, 1 Ld. Ray. 593. *Carneth v. Priour*, 1 Show. 4.

NOTE 61. See *p. 474.

It is said in Fleta, that the rule requiring the production of suit in the declaration, is the subject of one of the *provisions of Magna Charta. *Ad hoc facit hoc Sta-* [*xcvii] *tutum in Magna Charta*: — “Nullus liber homo ponatur ad legem, nec ad juramentum, per simplicem loquelam, sine testibus fidelibus ad hoc ductis.” (z)

(u) 2 Wms. Saund. 209 c. n. (1); 1 Chitty, 460, 6th edit.; 1 Arch. 304.

(x) 1 Chitty, 460, 6th edit.; 2 Wms. Saund. 209 c. n. (1).

(y) See *Alice v. Gale*, 10 Mod. 112. *Godson v. Good*, 6 Taunt. 595; 2 Saund. by P. & W. p. 209 c. n. (e), where the learned editors of Saunders, in a note not published when the remarks in the text were first made, appear to coincide with them.

(z) Fleta, 137.

NOTE 62. See * p. 476.

The order of pleading, according to Mr. Tidd, is as follows:—

1. To the jurisdiction of the court.
2. To the person . . . { 1. Of the plaintiff.
2. Of the defendant.
3. To the count.
4. To the writ . . . { 1. To the form of the writ.
2. To the action of the writ.
5. To the action itself; in bar thereof. (a)

And it is given in nearly the same manner, in the Preface to the *Doctrina Placitandi*, and in Bacon's *Abridgment*. (b)

Lord Holt states it more generally:—“The law has prescribed and settled the order of pleading which the party is to pursue—viz. to the jurisdiction of the court—to the disability of the person—to the count—to the writ, and, lastly, to the action.” (c)

This is almost in the same terms with Lord Coke:—

“First, in good order of pleading, a man must plead to the jurisdiction of the court.—2. To the person,—and therein, first to the person of the plaintiff, and then to the person of [* xcvi] the defendant.—3. To the count.—4. To the * writ.—5. To the action, &c. Which order and form of pleading you shall read in the ancient authors, agreeable to the law at this day; and if the defendant misorder any of these, he loseth the benefit of the former.” (d)

NOTE 63. See * p. 477.

The rule by which a plea in abatement is required to give the plaintiff a better writ, is very ancient, being laid down by Bracton, in the reign of Henry III. Thus he says, in speaking of the plea of non tenure,—*Notandum, quod cum tenens semel talem exceptionem proposuerit, ulterius consimilem proponere non possit, ne diutius protrahatur negotium; et tenens ad hoc poterit coarctari, quod ostendat quis in possessione extiterit—ne iterum cadet breve per mendacium; et, etiam ad omnes exceptiones quæ faciunt ad breve prosternendum.* (e) So Britton says, in speaking of the same

(a) Tidd, 680, 8th edit.

(b) *Bac. Ab. Pleas, &c.* (A.)

(c) *Longueville v. Thistleworth*, *Ld. Raym.* 970.

(d) *Co. Litt.* 303 a.

(e) *Bract.* 481 b.

plea, — Si le tenant die que il ne tient mye l'entier, adonques covient que il die qui tient le remenaunt. Car nous volons eus ceo que brefs se abatent par vice et par errour, que les tenaunts informent les plaintifes coment ils purchaserount bons brefes. (*f*)

NOTE 64. See * p. 479.

This principle, relative to dilatory pleas, viz. that they should be pleaded at a preliminary stage of the suit, appears to have been borrowed from the canon or civil law. *Dilatoriae exceptiones*, si *declinatoriae iudicii*, *ab initio* et in *litis ingressu*, proponi debent; alioquin, omisæ, non repetuntur; ut neque quæ contra iudicem, vel ejus incompetentiam, * proponuntur, — quæ [* xcix] defensionem præcedere debent, &c. (*g*) Si quis advocatus, *inter exordia litis prætermisam dilatoriam præscriptionem* (i. e. exceptionem), postea voluerit exercere, et ab hujusmodi opitulatione submotus, nihilominus perseveret, atque *præposteræ defensionis* institerit, unius libræ auri condemnatione multetur. (*h*)

NOTE 65. See * p. 480.

The rule, requiring that each pleading should be supported by proof, appears to have extended equally to the declaration, and to the subsequent pleadings; for the *Secta* was considered as a species of proof offered in support of the declaration.

To establish in a satisfactory manner the existence of this rule, several authorities shall here be cited. First, in speaking of the intentio, or count, in a writ of right, Bracton says, — Item non sufficit quod petens intentionem suam sic proponat et fundet, nisi sic fundatam probaverit, et dicatur in fine intentionis fundatæ, “et quod tale sit jus suum offert,” &c. (*i*) Again, with respect to exceptiones, or pleas generally, he lays it down, Sicut ille qui dicit, tenetur probare actionem, — ita ille qui excipit, exceptionem, — sive affirmando, sive negando, dum tamen negativa habeat in se, affirmativam implicitam. (*k*) So he says, that where a tenant has occasion to plead the grant of the demandant, *ostendere debet tenens chartam ad probandam exceptionem suam*, quod si non fecerit, exceptio sua nulla, et amittat sicut *indefensus*. Si autem chartam

(*f*) Brit. c. 84.

(*g*) Corv. Jus Canon. lib. 3, tit. 32.

(*h*) Cod. lib. 8, tit. 36, s. 9.

(*i*) Bract. 373 b.

(*k*) Ibid. 373 b.

forte exhibere non possit, quia illam ad manum non habuerit, [*c] de necessitate erit ad patriam *recurrendum. (l) And of exceptiones in general, he says — Sicut necesse est actionem proponere, et fundare, et *probare*, ut prima facie justa videatur, — ita oportebit exceptionem. (m) The reader may also be referred to the Placitorum Abbreviatio, passim, — where the pleadings are constantly accompanied with an offer of some method of proof. The latter work contains, in particular, the following entries, which afford strong confirmation of the same principle.

Isabella de B. petit versus R. de B., dimidium, &c. ut jus suum et hereditatem. Et ipse venit et defendit jus suum. *Et ipsa nullam sectam adduxit. Eat sine die.* (n)

Gilbertus de Beivill petit versus Willielmum de Beivill duas virgatas terræ cum pertinentiis in Gunetrop, quæ eum contingunt de socagio quod fuit patris eorum, in eadem villâ. Willielmus defendit quod socagium illud nunquam partitum fuit, nec debet partiri. Et hoc offert defendere, &c. Quia *Gilbertus nullam probationem produxit*, consideratum est quod Willielmus eat inde sine die, et quietus. (o)

In action of assise, of novel disseisin, we have the following entry : — Assisa venit recognitura si Oliverus filius Ranulfi Haki, et Simon Medicus, disseisiverunt Willielmum filium Simonis, et Sibillam uxorem suam, injustè et sine judicio, de libero tenemento suo in Cliftun infra assisam. Simon Medicus dicit, quod ipse disrationavit illud tenementum versus Oliverum, in curia Domini Regis, per concordiam inde inter eos factam. *Et inde protulit chirographum factum inter eos inde.* Et Oliverus venit, et idem testatur; et dicit quod disrationavit terram illam per assisam mortis antecessoris, versus matrem suam et fratrem suum, et ipsam [*ci] Sibillam sororem suam, post obitum patris sui; in *qua terra ipsi injustè se tenerunt. *Et inde producit milites de comitatu, qui eidem assisæ capiendæ interfuerunt, et hi idem testantur.* Willielmus et Sibilla dicunt quod postquam inde Oliverus disrationavit illam terram, dedit eis terram illam, et homagium inde cepit. *Et inde ponunt se super visinetum.* (p)

(l) Bract. 34 a.

(m) Ibid. 400 a.; see also 215 b.

(n) Plac. Ab. 62; 7 Staff. rot. 7; temp. 10 Johan.

(o) Plac. Ab. temp. Johan.

(p) Plac. Ab. 81; Bed. rot. 4.

The following is an entry in an assise of mortancestor :

Assisa venit recognitura si Willielmus pater Jurdani saisitus fuit in dominico suo ut de feodo, de duabus carucatis terræ cum pertinentiis in Tadestorn. die qua obiit ; et si obiit post primam coronationem Henrici Regis, patris Domini Regis ; et si præfatus Jurdanus propinquior hæres ejus sit ; quam terram Thomas frater Willielmi de Mare tenet. Et prædictus Thomas venit et dixit quod assisa inde fieri non debet, quia ipse Jurdanus et frater ejus primogenitus implacitaverunt ipsum Thomam de ipsa terra per breve de recto, ita quod per placitum illud, quædam particula de terra illa, eis remansit ; et postea ceperunt pro eadem terrâ duas marcas argenti et unum chazurum. *Et hoc offert probare adversus eum, prout Curia consideravit. Sed nullam produxit probationem.* Et Jurdanus venit et defendit quod ipse nullum fratrem primogenitum legitime natum habuit. Et quod ipse nunquam in curia ulla, quietam clamavit terram illam, nec inde duas marcas vel pecuniam aliquam inde cepit. *Et hoc offert defendere per quendam liberum hominem suum. Et Thomas nihil quam defensionem illam dixit vel obtulit, nec sectam quod ipse Jurdanus primogenitum fratrem habuit, produxit, nec curiam aliquam in qua placitum esset inter eos, nec quando finis factus esset inter eos.* Consideratum est quod ipse Jurdanus habeat inde saisinam suam. (g)

* These authorities, to which many others of the same [* cii] class might easily be added, are sufficient to prove that a tender of evidence was, before and at the time when Bracton wrote, considered as a necessary ingredient in all pleadings of the affirmative kind. Soon after that period, however, the process of pleading began to be conducted with a more distinct and single view to the development of the particular question in controversy, or production of the issue ; and when so conducted, the offer of evidence in support of any allegation, would naturally be considered as premature, till it were ascertained that such matter came into dispute. The rule in question appears, therefore, under the influence of this cause, to have suffered a silent abrogation ; yet vestiges of it to this day remain, in the *production of suit*, and in the formal *verification*.

NOTE 66. See * p. 480.

Thus Bracton lays it down (in a passage cited in the last note) Si autem chartam forte exhibere non possit, quia illam ad manum

(g) Plac. Ab. 20; Hertf. temp. Ric. I.

non habuerit, de necessitate erit *ad patriam* recurrendum. (r) Again, in treating of the Exception that the demandant was a villein, he says, oportet quod tenens probet exceptionem per parentes, quos statim habeat ad manum, si possit, &c. But, if the case was that no parentes could be produced on either side, then recourse was to be had to a *Jurata*. *Probat* enim tenens exceptionem *per juratam*; in quam de necessitate consentire oportet, *propter defectum alterius probationis*; quia si non habeat parentes, de necessitate recurritur ad *juratam* — alioquin, *nulla erit exceptio, quasi deficiente probatione*. Eodem modo dici poterit de [* ciiv] replicatione * querentis. (s) Again, this author observes, *Probari* poterit exceptio multis modis, tum per vocem mortuam, sicut per instrumenta; tum per vivam, sicut per *patriam* et inquisitiones, &c. (t) And in another place, he speaks of probatio per instrumenta — quæ quidem si non fuerint recognita, fides eorum multipliciter *probari* poterit, vel per collationem signorum, vel per testes, vel per *patriam*, et aliis multis modis, &c. (u)

Even in the phraseology of later times, trial by jury is mentioned as a mode of *proof*. Constable's case, 5 Rep. 108 a. *Ladd v. Garrod*, Lutw. 665; Vin. Ab. Trial (G. a.)

NOTE 67. See * p. 480.

Prest, &c. was the constant form in the *vivâ voce* pleading of offering to prove *by jury*, as appears by the Year-books.

Sometimes the *prest*, or *prest &c.* is more fully given, thus — *prest d'averrer*, that is, *ready to prove or to verify*.

NOTE 68. See * p. 486.

The following examples (which, independently of the view in which they are adduced, are curious, and deserve attention,) will illustrate the original meaning and object of the *profert*; and, as the author conceives, fully support him in the new view he has ventured to take on this subject.

In the first of them it will be observed, the plaintiff of- [* civ] fers proofs, both by deeds and by the Roll of Winton, * and the defendant also refers to deeds in support of his plea.

Abbas Sampson queritur quod Osbertus de Weckesham, miles

(r) Bract. 34 a.

(s) Ibid. 216 a.

(t) Ibid. 400 a.

(u) Bract. 305 a; et vide 289 b. 290 b.

episcopi Eliensis, injustè levavit furcas, et suspendium fecit, in manerio de Heckam infra libertatem Scti Edmundi; et contra libertatem quam habuit Beatus Edmundus a tempore Regis Edwardi, et ex ejusdem Regis dono. Et inde *protulit cartas* diversorum Regum, &c. Et *præterea ponit se inde super Rotulum Winton*, &c. Osbertus venit et trahit inde Episcopum Eliensem ad warrentum. Episcopus venit et warrantizat illud suspendium quod et de jure factum fuit, ut dicit, quia libertatem habuit et habet Sancta Ethildreda a tempore Edgari Regis, qui universas libertates dedit ecclesiæ Sanctæ Ethildredæ, cum suspendii libertate, &c. *Protulit etiam cartam* et confirmationem Regis Edwardi, qui confirmavit libertates omnes ita datas Sanctæ Ethildredæ, tam in manerio de Heckam, cujus membrum est Weckesham, et in pertinentiis omnibus, quam in aliis maneriis, sine omne exceptione, &c., sicut Rex Edgarus eis concesserat. *Protulit etiam cartas* Regum Willielmi Conquestoris, Henrici avi, et aliorum, &c. (x)

In the next example the plaintiff offers a *deed* with the subscribing witnesses, — or the *grand assise*, — as *alternative modes of proof*.

Johannes de Crioill, et Johanna uxor ejus, petunt versus Petrum de Goldington terram de Winchinton, tenendam et habendam, sicut illam quæ data fuit eidem Johanni, in liberum maritagium, ex dono Petri de Goldington et Evæ uxoris suæ, et unde Willielmus pater ejus et Johanna uxor ejus seisisi fuerunt tempore Henrici Regis patris, et ipse Johannes Crioill postea, capiendo inde *explecia* ad * valenciam xx soldorum, &c. Et inde *protulerunt cartam* Petri de Goldington, et Evæ uxoris suæ, donationem testantem. Petrus venit et defendit jus, &c., et dicit quod terra illa de Winchinton fuit maritagium Evæ matris suæ, et eidem descendit tanquam recto heredi, et offert defendere jus et donationem cartæ, &c. Et *præterea ponit se in magnam assisam Domini Regis*, &c. Ipse e contra dicit quod *ponit se in magnam assisam, si sufficere ei non potest carta* Petri patris sui et Evæ matris suæ (quæ testatur quod si non possint ei terram illam warrantizare excambium ei facient ad valenciam in Stokes vel in Cotes), et *vivæ voces testium cartæ*, &c. (y)

The following passage of Bracton, already cited for other purposes in previous notes, seems decisively to confirm the same view of the original meaning of the profert.

(x) Plac. Ab. 22; Suffolc. rot. 7.

(y) Vide Plac. Ab. 63; Leic. rot. 13.

Ostendere debet tenens chartam ad probandam exceptionem suam; quod si non fecerit, exceptio sua nulla, et amittat sicut indefensus. Si autem chartam forte exhibere non possit, quia illam ad manum non habuerit, de necessitate erit ad patriam recurrendum. Et eodem modo si casum allegaverit, et casum probaverit. (z)

On this subject, it is not undeserving of remark, that though in the Queen's Bench the profert is made in the *body* of the declaration, yet in the Common Pleas its proper place is at the *conclusion*; a position that entirely corresponds with the idea that it is derived from the old rule of law in question; under which it was the practice to make the offer of proof at the *conclusion* of the pleading, as appears by the examples cited in this note, and by a great variety of entries in the Placitorum Abbreviatio.

(z) Bract. 34 a.

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